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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GENERAL AMERICAN TRANSPORTATION CORPORATION, *et al.*,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENT RAILROADS AND ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION TO PETITION

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QUESTIONS PRESENTED

In a 1977 rate case, the Interstate Commerce Commission ("Commission") held that a railroad could not levy a direct charge for transporting privately owned rail cars to and from repair facilities if it derived more than *de minimis* revenue from loaded movements of such cars. In a 1987 rate case, based upon new evidence, the Commission found that this regulatory approach had created tremendous inefficiency and had denied many railroads adequate compensation for their services. After reexamining the statutory provisions previously in effect and considering remedial legislation enacted in 1980, the Commission concluded that the Indiana Harbor Belt Railroad Company ("IHB") and The Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT") had lawfully established separate rates for this service. The Commission's decision was unanimously affirmed by the United States Court of Appeals for the District of Columbia Circuit. The questions presented here are:

1. Was the Commission barred from reexamining its 1977 decision because the 1980 legislation did not expressly address the right of a railroad to charge for moving privately owned cars to repair facilities?
2. Was the decision below in conflict with a prior decision of the Seventh Circuit?
3. Did the Commission abuse its discretion in upholding the rates established by IHB and BOCT without guaranteeing that the car owners would fully recover any costs incurred as a result of these charges?
4. Having determined that the rail carriers had lawfully established separate rates for this service, did the Commission err in finding that the complainants were not entitled to an award of damages?

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BRIEF OF RESPONDENT RAILROADS AND ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION TO PETITION

The Indiana Harbor Belt Railroad Company ("IHB"), The Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT"), and the Association of American Railroads ("AAR"), intervenors in the court of appeals below, submit this brief in opposition to the petition for a writ of certiorari filed by General American Transportation Corporation and its supporters ("petitioners" or "car owners").[1]

STATEMENT

A. *The Applicable Statutes.* In the aftermath of the Penn Central bankruptcy and the collapse of nine other railroads, Congress passed a series of remedial acts, in-

[1] Appendix A lists the individual members of the AAR and provides the information required under Rule 28.1.

cluding the Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31, to enhance the financial viability of the nation's railroads. One of the key objectives of the 4R Act was to establish "less restrictive rate regulation."[2] Section 202(d) of the Act expressly authorized rail carriers to establish "separate rates for distinct rail services." 49 U.S.C. § 10728(a).[3] This provision was intended to "encourage competition," "promote increased reinvestment by rail carriers," and spur pricing "in accordance with the cash-outlay incurred by the carrier and the demand" for service. *Id.* §§ 10728(a)(1), (2) and (b)(1).[4]

Despite the enactment of the 4R Act, the financial troubles of the railroad industry continued. Large government subsidies remained necessary to maintain rail service in the Northeast,[5] and two major railroads became insolvent.

Faced with this continuing crisis, Congress once again found it necessary to revise the Interstate Commerce Act to mandate greater attention to the railroads' revenue needs. In enacting the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, Congress found that, without improved earnings, railroads would suffer a capital shortfall of 16 to 20 billion dollars by 1985, with disastrous

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[2] S. Rep. No. 499, 94th Cong., 1st Sess. 11 (1975), *reprinted in* 1976 U.S. Code Cong. & Admin. News 25.

[3] In accordance with Rule 34.1(f), the full text of the pertinent statutory provisions is set forth in Appendix B.

[4] In 1978, the Interstate Commerce Act was recodified, but this was entirely non-substantive. *See* Pub. L. No. 95-473, § 3(a), 92 Stat. 1337, 1466 (1978); *Connecticut Trust For Historic Preservation v. ICC*, 841 F.2d 479, 483 (2d Cir. 1988).

[5] *See Conrail Reauthorization: Hearings Before the Subcomm. On Surface Transp. Of The Comm. On Commerce, Science and Transp.*, 97th Cong., 1st Sess. 13 (1981) (statement of the Hon. Robert W. Blanchette, Administrator, Federal Railroad Administration).

effects on the nation's freight transport system. *Id.*, section 2, 94 Stat. 1896. Congress therefore declared that it was its "overall purpose . . . to provide, through financial assistance and freedom from unnecessary regulation, the opportunity for railroads to obtain adequate earnings to restore, maintain and improve their physical facilities while achieving the financial stability of the national rail system." H.R. Rep. No. 1430, 96th Cong., 2d Sess. 80 (1980), *reprinted in* 1980 U.S. Code Cong. & Admin. News 4110.

Congress recognized that "the benefits of the 4R Act" had been "less than anticipated." S. Rep. No. 470, 96th Cong., 1st Sess. 16 (1979). Many of the new "rate provisions (that is, peak period pricing and separate rates for distinct rail services) ha[d] been little used." *Id.* The Staggers Act was therefore "intended to simplify rate regulation" and to provide additional "pricing freedom" for the railroads. *Id.* 16-17; *see generally ICC v. Texas*, 479 U.S. 450, 460 (1987).

The Staggers Act mandated that, "to the maximum extent possible, competition and the demand for services [should] establish reasonable rates for transportation by rail . . . ." 49 U.S.C. § 10101a(1). The Act also sharply reduced the extent to which carriers could set rates collectively, 49 U.S.C. § 10706, and authorized individual railroads to "establish *any* rate for transportation or other service," unless that rate was unreasonably high or unreasonably low. 49 U.S.C. § 10701a(a) (emphasis added). In addition, the Act placed strict limits on the Commission's "unreasonable practice" jurisdiction. The Commission's authority to "determine and prescribe" reasonable practices could "not be used, directly or indirectly, to limit the rates which rail carriers are otherwise authorized to establish . . . ." 49 U.S.C. § 10707a(h).

Congress recognized that services that do not generate a sufficient rate of return should not be subsidized by rates on services provided to other (more demand-

inelastic) shippers. 49 U.S.C. § 10101a(10). Railroads were prohibited from establishing rates that do not contribute to "going concern value," 49 U.S.C. § 10701a(c)(1)-(2), and in individual rate cases, shippers were authorized to submit evidence addressing the question whether a carrier's rates cross-subsidized other shippers. 49 U.S.C. § 10707a(e)(2)(C).

B. *The Use Of Privately Owned Cars.* Railroads have always been the principal source of rail cars for the shipping public. Despite inadequate earnings, rail carriers have continued to invest in freight cars to satisfy their common carrier obligation.[6]

In meeting that obligation, however, "[r]ailroads are not expected to acquire equipment that cannot be economically justified by the traffic available."[7] Demand for rail service has always been highly cyclical, and it has long been recognized that "it would be a questionable use of limited railroad capital for the carriers to acquire all of the equipment needed to handle the periodic peak traffic when those cars would otherwise sit idle."[8] During peak traffic periods, railroads must provide freight cars for their shippers, but they are not required to supply cars immediately.[9]

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[6] J.A. 831-832; *Railroad Revenue Adequacy—1986 Determination*, 3 I.C.C.2d 966 (1987).

[7] *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry.*, 4 I.C.C.2d 1, 15 (1987) ("*LOSAC*"), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 2429 (1989); *see also* 49 U.S.C. § 11121(a)(1)(B).

[8] *Allied Corp. v. Union Pac. R.R.*, 1 I.C.C.2d 480, 484, *aff'd sub nom. Allied Corp. v. United States*, 779 F.2d 41 (3d Cir. 1985); *see also Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325 (1981).

[9] *Allied Corp.*, 1 I.C.C.2d at 484. In addition, railroads must provide "suitable cars," but are not required to supply highly specialized cars. *Id.* at 483.

In order to avoid these delays and obtain other competitive advantages, a shipper may lease or purchase its own cars. Typically, these cars are used exclusively by that shipper, and they may even be dedicated to a particular route or service. J.A. 924-927.

Railroads compensate private car owners for the use of their cars in several ways. In some instances, compensation is provided in the form of "allowance" payments. Allowance formulas are tied to market factors and to the private car owners' costs of owning and maintaining their cars.[10] When allowance payments are not made (and sometimes even when they are made), shippers receive compensation in other forms, including lower freight rates.[11] The railroad may establish a "dual" rate scale, effectively providing a discount for loaded movements in privately owned cars.

Private car owners are responsible for routine maintenance—so-called "ordinary repairs"—of their cars. Their repair costs typically are factored into the existing allowance formulas, when such formulas exist, and are inevitably reflected in market-based compensation when they do not. Most car owners arrange for such repairs at privately owned repair facilities; there are more than

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[10] In 1985, the AAR reached agreement with tank car owners on a new allowance formula. *See Investigation Of Tank Car Allowance System*, 3 I.C.C.2d 196 (1986). Since 1983, all new covered hopper allowances have been set by individual railroads, often after negotiations with shippers. Many grain hauling railroads have placed limits (which car owners call "allowance caps") on the allowances paid on particular movements, reflecting the reduced economic value of surplus grain cars. The savings have been passed on directly to grain shippers in the form of huge freight rate reductions. *LOSAC*, 4 I.C.C.2d at 1-20.

[11] *See LOSAC*, 4 I.C.C.2d at 17; *Natural Gas Pipeline Co. v. New York Central R.R.*, 323 I.C.C. 75, 79 (1964); *Eastern Central Motor Carriers Ass'n, Inc. v. Baltimore & O. R.R.*, 314 I.C.C. 5 (1961), *aff'd sub nom. Cooper-Jarret, Inc. v. United States*, 226 F. Supp. 318 (W.D. Mo.), *aff'd per curiam*, 379 U.S. 6 (1964).

two hundred such facilities in the United States, many of which are owned by the car owners themselves. J.A. 834. The railroads serving these facilities must transport private cars to and from the chosen facilities for ordinary repairs at the car owner's direction. *Id.*; *see also* J.A. 945.

C. *Indiana Harbor I And The Proceedings Below.* In 1977, a division of the Commission held that a railroad may not levy a direct charge for transporting privately owned cars to and from repair facilities if it derives more than *de minimus* revenue from loaded movements of such cars. *General Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, 357 I.C.C. 102, 126-27 (1977) ("*Indiana Harbor I*"), *aff'd*, *Indiana Harbor Belt R.R. v. General Am. Transp. Co.*, 577 F.2d 394 (7th Cir. 1978). The Commission proclaimed that "the costs of repair movements of privately owned cars must be treated as a common cost which must be shared by all carriers which derive revenue from the national private-car fleet." *Id.* at 127.

Approximately three years later, Congress enacted the Staggers Act, and many railroads began to establish separate rates for movements of privately owned cars to repair facilities. Car owners challenged some of these rates at the Commission but, beginning in 1982, the agency issued a series of decisions upholding separate charges.[12] In these cases, the Commission purported to distinguish *Indiana Harbor I*, but at least one Commis-

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[12] *See, e.g.*, Docket No. 38792, *Switching Charges For Privately-Owned Cars Billed To Repair Facilities* (decision served October 18, 1982) ("*CHTT Switching Charges*"), *aff'd in pertinent part, Evans Prods. Co. v. ICC*, 729 F.2d 1107 (7th Cir. 1984); Docket No. 39392, *PPG v. Akron & Barberton Belt R.R.*, (Review Board decision served June 28, 1984); Docket No. 38646, *Inland Steel Co. v. Illinois Central Gulf R.R.* (Review Board decision served May 24, 1982). A copy of each unpublished Commission decision cited herein has been lodged with the Court.

sioner openly declared that the agency's 1977 decision should be overturned.[13]

The IHB and BOCT switch large numbers of private cars each year to numerous repair facilities located on their lines, and their sporadic earnings under the "equalization" rule did not come close to covering their costs.[14] Shortly after the Commission had issued its decision upholding the separate rates established by the Chicago Heights Terminal Transfer Railroad Company ("CHTT"), IHB and BOCT independently published switching charges for movements of empty cars to repair facilities on their lines. These charges were applicable only to switching movements not immediately followed or preceded by a loaded movement on the lines of the IHB or BOCT, respectively.

Following standard Commission procedures for adjudicating complaints about individual railroad rates, sev-

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[13] In a 1982 concurring opinion, Commissioner Andre described the agency's 1977 ruling as "bad law and bad policy." *CHTT Switching Charges* at 10. He also emphasized that "sound policy requires that railroads be as free as possible to break separate components of a service out of the general rate structure and finance them by separate and distinct charges." *Id.* at 11. Only in this way could railroads "avoid the harmful results of cross-subsidization and rate averaging." *Id.*

[14] The equalization rule is described in the Commission's decision in *General Am. Transp. Corp. v. Indiana Harbor Belt R.R.*, 3 I.C.C.2d 599, 601 n.5 (1987) ("*Indiana Harbor II*"), Pet. 40a n.5. It was designed to provide a monetary incentive for more efficient management of private cars, and was never intended as a substitute for compensatory rates to repair facilities. J.A. 921-922; J.A. 945-946; J.A. 955-956.

Before the switching charges challenged in Docket No. 39380 became effective, BOCT had incurred variable costs of nearly $1 million per year in switching private cars into and out of repair facilities. Yet BOCT had received no revenue under the equalization rule since 1979. J.A. 335; J.A. 494. During the period 1978 to 1982, the IHB received $96,263 under the "equalization" rule, which covered only about 12 percent of its variable costs incurred in providing this service. J.A. 315.

eral private car owners petitioned for suspension and investigation of the IHB and BOCT tariffs.[15] Those petitions were denied, and in early 1983, the IHB and BOCT tariffs became effective.[16] The car owners then filed a formal complaint against these railroads' tariffs, seeking to have them cancelled as an unreasonable practice.

In the ensuing rate case, the evidence demonstrated that the approach adopted in *Indiana Harbor I* created a highly distorted pricing system. Two leading economists, Professors Willig and Kyle of Princeton University, explained that in a free-market economy, prices serve two basic purposes. First, prices enable providers of goods and services to recover their costs and remain in business. J.A. 901-903. Second, they guide the allocation of resources and thereby promote efficiency. *Id.*

Under *Indiana Harbor I*, neither pricing function was achieved. Carriers were required to transport privately owned cars to and from repair facilities, but generally were prohibited from imposing a separate charge for this service. The cost recovery function of pricing was frustrated because, while *Indiana Harbor I* assumed that carriers could allocate costs to loaded movements at will, many carriers were in fact unable to recover the costs

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[15] Under the Interstate Commerce Act, the lawfulness of a new tariff or tariff amendment may be challenged before its effective date by a petition for suspension and investigation (*see* 49 U.S.C. § 10707) or by complaint after the rate is in effect (49 U.S.C. § 11701(b)). Both approaches were taken by the car owners in this case.

[16] Division 1 of the Commission, acting as an Appellate Division, denied the car owners' appeals from the decisions of the Suspension Board refusing to suspend or investigate these new rates. *See* Suspension Case No. 70993, *Movement Of Empty Cars To/From Facilities For Cleaning, Etc.* (notice served February 10, 1983); Suspension Case No. 71025, *New Charges For Empty Car Movements, Baltimore And Ohio Chicago Terminal R.R.* (notice served March 22, 1983).

of this service in other rates.[17] As a result, many carriers were forced to subsidize this service, regardless of its effects on their overall revenues. J.A. 902-904, 906-910.

The second function of prices—promoting the efficient allocation of resources—was also frustrated by the holding in *Indiana Harbor I*. Private car owners received the benefits of this rail service, but did not directly bear the costs. As a result, they demanded and received a level of service which was, from an economic standpoint, excessive and inefficient. J.A. 910-912.[18]

In 1987, the Commission issued its decision upholding the rates established by IHB and BOCT. The Commission emphasized that the regulatory approach adopted in

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[17] J.A. 486; J.A. 1149-1156. There is no necessary relationship between the volume of private car repair traffic a particular railroad handles and the volume of loaded line-haul or switching traffic it handles. A railroad that moves a car to a repair facility does not necessarily carry loaded movements in that car or even in other cars of the same type. J.A. 492-494. Some carriers are geographically well placed to provide movements of private cars to repair facilities concentrated on their lines, but are poorly placed to secure a corresponding amount of loaded line-haul business in such cars. Others carry substantial loaded traffic in private cars but transport few of these cars to repair facilities.

From an economic standpoint, the transportation of private cars to and from repair facilities is a separate and distinct service. J.A. 906-907; J.A. 790-791. If the demand for a carrier's line-haul services is insufficient to allow recovery of both line-haul costs and the costs of repair movements, then the line-haul rates simply will not cover the costs of both services. J.A. 906-909.

[18] The regulatory scheme adopted in *Indiana Harbor I* produced many of the same results as a rule requiring landlords to provide all tenants with free electricity. Since tenants would not bear the costs of their electricity, they would have no incentive to consider those costs in setting their thermostats or making other decisions on energy consumption. And tenants who consumed more than average quantities of energy would effectively be cross-subsidized by tenants who conserved energy. *See* J.A. 903-905.

Indiana Harbor I was "in direct conflict with" the statutory provisions of "the 4R Act and the Staggers Act." *Indiana Harbor II*, 3 I.C.C. 2d at 611, Pet. 55a. The Commission recognized that as a result of its 1977 decision, "the costs of repair movements [had] unfairly been placed on certain railroads who make a disproportionate number of repair moves." *Id.* at 604, Pet. 46a.[19] The only solution that was both lawful and efficient was to allow carriers to establish separate charges "for hauling empty, privately owned cars to and from repair facilities." *Id.* at 599, 613-14, Pet. 38a, 59a. These charges could then "be included in the computation of mileage allowances that the railroads pay the shippers." *Id.* at 599, 613-16, Pet. 38a, 59a-63a. The Commission also emphasized that its prior approach had arisen "in an era when rate averaging and cross subsidy were commonplace." *Id.* at 607, Pet. 49a-50a. The 4R and Staggers Acts, however, were intended to curtail cross-subsidies and "collective" action. *Id.* at 601-602, 607, Pet. 41a-42a, 49a-51a.

On February 29, 1988, the Commission unanimously denied a petition for reconsideration. Docket No. 35404, *General Am. Transp. Corp. v. Indiana Harbor Belt R.R.* (decision served February 29, 1988) ("*Indiana Harbor III*"), Pet. 69a-78a. The Railway Progress Institute ("RPI") had argued that the Commission's new approach was unlawful because it would result in car owners "bear[ing] at least some of the cost of repair moves." *Id.* at 2, Pet. 71a. The Commission squarely rejected this claim, stating:

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[19] The Commission found that, "[f]rom 1978 through 1982, IHB switched 5,805 cars to repair shops and the same number from those facilities." *Indiana Harbor II*, 3 I.C.C.2d at 604, Pet. 46a. "If switching charges had applied, its revenues would have been approximately $856,452." *Id.* "However, during this period its recovery under the tank car equalization rule was only $96,263." *Id.*

> The railroads' obligation to compensate car owners for costs of ownership including repair movements still exists, but the most plausible statutory basis for discharging that obligation within the regulatory framework of published rates is section 11122, which governs private car compensation generally. That section, as we discussed in *Indiana Harbor II*, requires that private car compensation reflect not only costs of ownership, but the sometimes conflicting considerations of the national level of car ownership and other non-cost factors that affect the supply and efficient use of cars. [Citation omitted.] Thus, it does not guarantee that individual car owners will receive their overall costs of ownership, let alone dollar for dollar reimbursement of one specific element of ownership costs: repair moves. [Citations omitted].

Id., Pet. 71a-72a.

RPI had also argued that the Commission was precluded from changing its approach because shippers and car owners had relied upon *Indiana Harbor I* in negotiating rate contracts and car leasing agreements. In rejecting this argument, the Commission emphasized that "voluntary private contracts cannot bind Congress or this Commission to maintenance of the regulatory status quo." *Indiana Harbor III* at 2, Pet. 72a. The Commission found "RPI's position here particularly unpersuasive inasmuch as it had sufficient notice of the fact that *IHB I* was becoming increasingly out of step with the prevailing regulatory and industry environments." *Id.* at 3, Pet. 73a. "Post *IHB I* decisions began clearly to regard *IHB I* as 'bad law and policy' signaling that a change was imminent." *Id.* "Private car owners therefore had sufficient notice that the regulatory environment was in transition." *Id.* Accordingly, the Commission found that RPI had "failed to establish material error or any other grounds for reopening this proceeding." *Id.* at 5, Pet. 78a.

The United States Court of Appeals for the District of Columbia Circuit unanimously upheld the Commission's decision and denied the car owners' petition for rehearing and suggestion for rehearing *en banc*. *General Am. Transp. Corp. v. ICC*, 872 F.2d 1048 (D.C. Cir.), *reh'g denied*, 883 F.2d 1029 (D.C. Cir. 1989), Pet. 1a-34a.

ARGUMENT

The fundamental issue presented here is whether the Commission and the court below properly determined that IHB and BOCT had lawfully established separate rates for moving privately owned cars to repair facilities. Both the Commission and the court held that the assessment of separate charges was permissible because the transportation of privately owned cars to and from repair facilities qualifies as a "distinct rail service" under section 10728. This issue has been committed by Congress to the agency's discretion, and there are no questions of statutory construction or conflicts among the courts of appeals that warrant review by this Court. The car owners seize upon the fact that the Commission followed a different approach in a 1977 rate case, and they argue that by failing to amend section 10728 three years later, Congress ratified the agency's prior decision. Congress' silence on this obscure rate issue, however, cannot properly be converted into a statutory compulsion to maintain the *status quo ante*. This is particularly true here, because as the Commission and the court emphasized, Congress in 1980 added new provisions designed to encourage independent pricing of distinct services, reduce inefficiency, eliminate non-compensatory rates, and ensure that railroads have a realistic opportunity to earn adequate revenues. *See* 49 U.S.C. §§ 10101a(1), (3), (10), (11), 10701a, 10704(a)(2), and 10707a(e)(2).

The car owners also claim that the decision below was "arbitrary and capricious" because it did not guarantee that car owners fully recover any costs they

incur as a result of IHB's and BOCT's separate charges for movements to repair facilities. Yet preexisting case law had established that car owners are no more entitled to a guarantee of full recovery of car ownership costs than are railroads. In addition, as the court of appeals explained, car owners will have the same opportunity to recover the costs of movements to repair facilities as they do to recover their other ownership costs.

Finally, the car owners allege that by failing to award damages, the Commission rescinded a prior "rule" "retroactively." Yet the Commission's prior decision on movements to repair facilities was never codified in a rule or regulation. It was issued in an adjudicatory rate case and could be reversed in a subsequent rate case such as this one. Moreover, since the car owners did not prove that any statutory violations occurred, they could not possibly have been entitled to an award of damages.

I. THE COURT OF APPEALS CORRECTLY HELD THAT, IN ENACTING THE STAGGERS ACT, CONGRESS DID NOT "RATIFY" THE COMMISSION'S PRIOR RATE DECISION

At this point, petitioners have abandoned any argument based on statutory language alone. This is not surprising, since the pertinent statutory provisions state only that a rail carrier *must* publish rates for "transportation" or "service," 49 U.S.C. § 10761(a), and that a carrier *may* "on its own initiative" establish "separate rates for distinct rail services," 49 U.S.C. § 10728(a).[20]

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[20] Separate rates are also authorized by section 10701a(a), which provides that a rail carrier "may establish *any* rate for transportation or other service," unless that rate is expressly prohibited by another statutory provision or is unreasonably high or unreasonably low. 49 U.S.C. § 10701a(a) (emphasis added); *Southwestern Millers' League v. Atchison, T. & S.F. Ry.*, 364 I.C.C. 724, 729 (1981).

While recognizing that the language of the statute does not directly support their position, petitioners claim that Congress "ratified" *Indiana Harbor I* when it enacted the Staggers Act without amending section 10728. Pet. at 11-16. There is nothing to this contention. Congress could not have placed its stamp of approval on the Commission's *Indiana Harbor I* ruling for the quite apparent reason that it never reenacted section 10728, the key statutory provision.[21] Congress did amend other provisions of the Act in 1980, but it left section 10728 untouched. As a result, petitioners can point to nothing in any congressional hearings, committee reports or floor debates that even mentions *Indiana Harbor I.*

Petitioners' argument thus rests on the untenable proposition that since Congress could have repudiated the Commission's decision, but did not, legislative approval must be inferred. The Court has long rejected such an approach to statutory interpretation. "Congress' silence is just that—silence . . . ." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). The Court has therefore warned that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." [22] Congress' failure to repudiate particular regulatory decisions "frequently betokens unawareness, preoccupation, or paralysis" rather than conscious choice.[23]

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[21] *Helvering v. Hallock*, 309 U.S. 106, 120-21 n.7 (1940); *Ward v. Commissioner*, 784 F.2d 1424, 1430 (9th Cir. 1986); *Fmali Herb, Inc. v. Heckler*, 715 F.2d 1385, 1387-88 n.1 (9th Cir. 1983).

[22] *Girouard v. United States*, 328 U.S. 61, 69 (1946); *see also Rodriquez v. Compass Shipping Co.*, 451 U.S. 596, 614-17 (1981); *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980); *Zuber v. Allen*, 396 U.S. 168, 185 & n.21 (1969); *Helvering v. Hallock*, 309 U.S. at 119-21 & n.7.

[23] *Zuber v. Allen*, 396 U.S. at 185-86 n.21; *see also McLaughlin v. Richland Shoe Co.*, 108 S. Ct. 1677, 1681 n.8 (1988); *United States v. Price*, 361 U.S. 304, 310-11 (1960); *Chisholm v. FCC*, 538 F.2d 349, 361 (D.C. Cir.), *cert. denied* 429 U.S. 890 (1976).

Even if Congress had reenacted the controlling statutory provision in this case, this alone—"particularly without the slightest affirmative indication that Congress ever had the [agency's] decision before it—is an unreliable indicium at best." *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955); *see also SEC v. Sloan*, 436 U.S. 103, 121 (1978); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 n.7 (1971); N. Singer, *Sutherland On Statutory Construction* § 49.09 at 400 (4th ed. 1984).[24] The principle that petitioners rely upon "is no more than an aid in statutory construction."[25] While "useful at times in resolving statutory ambiguities, it does not mean that the prior construc-

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[24] The cases cited by petitioners do not support their claim that the reenactment "doctrine" has often been applied without evidence that Congress was aware of the prior administrative interpretation. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 382, 384 n.74, 385 n.76, 387 (1982) ("review of the legislative history of the statute persuasively indicates that [the prior judicial interpretation] was indeed what Congress actually intended"; in fact, these judicial rulings were raised specifically in congressional hearings and Congress was found to have "evidenced an affirmative intent to preserve" that precedent); *Bob Jones Univ. v. United States*, 461 U.S. 574, 599-601 (1983) (Congress was "acutely aware" of the prior agency rulings, yet failed to act on any of the thirteen bills introduced in a twelve-year period to overturn those rulings); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 534 (1982) ("Congress was made aware of the [agency's] interpretation"); *Haig v. Agee*, 453 U.S. 280, 299 (1981) (history of agency interpretation "was repeatedly communicated to Congress"); *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) (subject of agency ruling "plainly has not escaped public or legislative notice," citing Senate subcommittee hearings on issue); *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979) (legislative history of statute "rather plainly indicates that Congress intended" to adopt prior judicial interpretation); *Lorillard v. Pons*, 434 U.S. 575, 581 (1978) ("detailed knowledge" of judicial precedent exhibited by Congress).

[25] *Helvering v. Reynolds*, 313 U.S. 428, 432 (1941); *see also Jones v. Liberty Glass Co.*, 332 U.S. 524, 533-34 (1947).

tion has become so embedded in the law that only Congress can effect a change." [26]

The court below properly applied these principles. "Congress [had] revisited the Interstate Commerce Act on two occasions subsequent to *Indiana Harbor I*—in 1978 when it recodified the Act and in 1980 when it approved the Staggers Act." *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1053 (citations omitted), Pet. 9a-10a. "But [the court saw] no indication that Congress was either aware of or had approved the Commission's empty-repair-move policy when it recodified the 'distinct rail services' provision in 1978 or in 1980 when it amended other portions of the Act." *Id.* The court also emphasized that "the force of congressional silence is particularly weak in this case given the abundant evidence" that "Congress, in passing the Staggers Act, wanted to put an end to ratemaking practices involving railroad cross-subsidization and other inefficiencies." *Id.* at 1053 n.10, Pet. 10a n.10.[27]

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[26] *Id.*; *see also Commissioner v. P.G. Lake, Inc.*, 356 U.S. 260, 265-66 n.5 (1958); *Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100 (1939); *McCoy v. United States*, 802 F.2d 762, 764-66 (4th Cir. 1986). As these cases indicate, even when an agency's prior interpretation is embodied in a regulation, the agency may subsequently change its approach. If a regulation has been promulgated, any change ordinarily must be implemented through use of the agency's rulemaking powers. In this case, however, the Commission never promulgated regulations specifically addressing movements to repair facilities. *See* pp. 21-25, *infra*.

[27] *See, e.g.*, 49 U.S.C. §§ 10101a(1), (3), (10); 10701a(c); 10707a(c), (e). The car owners now argue for the first time that Congress also ratified the Commission's ruling in *Union Tank Car Co.*, 268 I.C.C. 338 (1947). Yet *Union Tank Car* held only that railroads were not *required* to publish separate rates for this service; it did not address the question whether carriers could voluntarily establish separate charges. *Id.* at 342. In addition, when section 10728 was enacted in 1976, Congress was obviously attempting to increase the number of services for which separate charges could be imposed, not to codify the old Commission case law on this

In their determined effort to show that the decision below conflicts with the rulings of this Court, petitioners mistakenly rely "on the familiar notion that Congress is presumed to be aware of administrative interpretations of a statute or regulation when it adopts such language in a statute."[28] While "courts have stated this general proposition," usually "as a defense to a later attack against the same [agency] interpretation," the court of appeals has found "*no* case has rested on this presumption alone as a basis for holding that the statute required" a given interpretation.[29] Nor are the lower courts "in disarray" on this issue. A close reading of the cases indicates that an agency's prior construction is given weight in assessing Congress' intent only when there is at least some evidence that Congress was actually aware of the agency's prior interpretation.[30] Petitioners

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subject. *See, e.g.*, S. Rep. No. 499, 94th Cong., 1st Sess. 11 (1975), *reprinted in* 1976 U.S. Code Cong. & Admin. News 25 (a key objective of the 4R Act was to establish "[l]ess restrictive rate regulation").

[28] *AFL-CIO v. Brock*, 835 F.2d 912, 916 n.6 (D.C. Cir. 1987); Pet. at 12-14.

[29] *Id.* (emphasis in original), *citing inter alia Lindahl v. OPM*, 470 U.S. 768, 782-86 (1984) (evidence in legislative history that Congress was aware of particular interpretation); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. at 384-87 (same); *Lorillard v. Pons*, 434 U.S. at 581-85 (same). *See also* N. Singer, *Sutherland On Statutory Construction* § 49.09 at 400 (4th ed. 1984) (the "presumption" that Congress "knows and approves" prior constructions "does not apply where nothing indicates that the legislature has its attention directed to the administrative interpretation upon reenactment").

[30] *See, e.g., Osborn v. American Ass'n Of Retired Persons*, 660 F.2d 740, 746-47 (9th Cir. 1981) ("Congress was aware of [the agency's] interpretation of the Act, yet took no steps to change that interpretation when it reenacted the Act . . . [and] on the contrary, . . . expressed [a] feeling" supportive of the agency's ruling); *Demarest v. Manspeaker*, 884 F.2d 1343, 1346 (10th Cir. 1989) (express purpose of statutory revision supported prior ruling by agency and courts); *FMC Wyoming Corp. v. Hodel*, 816 F.2d

have never even alleged that Congress was aware of *Indiana Harbor I.*

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THE SEVENTH CIRCUIT

Petitioners also claim that the decision below conflicts with the decision of the Seventh Circuit upholding *Indiana Harbor I.* Pet. at 16-18. This purported conflict, however, stems entirely from their misinterpretation of the Seventh Circuit's opinion.

That court never held that the statute compelled the Commission's prior approach. Its decision did not, as the court below stated, rest "on a construction of the Interstate Commerce Act, much less a finding of specific congressional intent." *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1053, Pet. 9a. The Seventh Circuit emphasized that its only "responsibility" was to decide "(1) whether the Commission has acted within the power delegated to it by law; (2) whether the Commission's decision is supported by facts or substantial evidence; (3) whether the order is based on specific findings of fact from the record; (4) whether the Commission's conclusions have a rational basis." *Indiana Harbor Belt R.R. v. General Am. Transp. Corp.*, 577 F.2d at 397. The Seventh Circuit simply held that in light of the limited evidence available in 1977, the Commission's determination in *Indiana Harbor I* was "rational" and within its "statutory powers." *Id.* at 397, 404.[31]

496, 501 n.11 (10th Cir. 1987) (Congress "was aware" of agency interpretation), *cert. denied*, 108 S. Ct. 772 (1988); *In re Dep't Of Energy Stripper Well Exemption Litigation*, 690 F.2d 1375, 1386, 1388 (Temp. Emer. Ct. App. 1982) ("obvious" from congressional debates that subsequent agency interpretation accorded with congressional intent), *cert. denied*, 459 U.S. 1127 (1983).

[31] The car owners also cite two other Seventh Circuit cases (Pet. at 9, 16-17), but in both cases, the Seventh Circuit distinguished

In any event, the Commission's ruling in this case, and the decision of the court of appeals sustaining it, took into account new evidence that the Commission's old approach was not operating efficiently or equitably. The Seventh Circuit had assumed, for example, that railroads such as the IHB would be adequately compensated for this service under the "equalization rule" (*Indiana Harbor Belt R.R. v. General Am. Transp. Corp.*, 577 F.2d at 402), but later evidence demonstrated that the revenue IHB received under the equalization rule covered only a small fraction of its costs. J.A. 315, 322; *see generally General Am. Transp. Corp. v. ICC*, 872 F.2d at 1055, Pet. 13a-14a.[32]

In addition, by the time the court below had issued its decision, Congress had made significant changes in the Interstate Commerce Act.[33] Since the decision of the court

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Indiana Harbor I and ruled that railroads could properly establish separate charges for movements to repair facilities. In addition, neither decision considered the impact of the Staggers Act on the old regulatory regime. *See Evans Prods. Co. v. ICC*, 729 F.2d 1107 (7th Cir. 1984) (a switching railroad could properly charge car owners for movements to repair facilities; the railroad, however, could not impose such charges on the facilities *receiving* these shipments); *Atchison, T. & S.F. Ry. v. Union Tank Car Co.*, 611 F.2d 1184 (7th Cir. 1979) (railroads could properly assess charges for transporting rail cars from the Mexican border to repair facilities in Kansas, Louisiana, and Illinois).

[32] In testimony before the Commission, two prominent economists also explained that the approach adopted in *Indiana Harbor I* led to inefficiency and overconsumption of rail services. Since car owners were not required to pay for this service, they had no incentive to consider transportation costs in selecting repair facilities. J.A. 910-913; *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1051, Pet. 7a.

[33] Under the newly established rail transportation policy, for example, the Commission was required to encourage demand-based pricing, eliminate non-compensatory rates, promote efficiency, and allow railroads a realistic opportunity to earn adequate revenues. *See* 49 U.S.C. § 10101a(1), (3), (10). By changing the rail transportation policy, the Staggers Act gave the Commission new guid-

of appeals was based in part on these new statutory provisions, the prior ruling of the Seventh Circuit had no precedential value.

III. THE COURT OF APPEALS CORRECTLY HELD THAT, IN UPHOLDING THE RATES ESTABLISHED BY IHB AND BOCT, THE COMMISSION WAS NOT REQUIRED TO GUARANTEE THAT THE CAR OWNERS WOULD FULLY RECOVER ANY COSTS INCURRED AS A RESULT OF THESE CHARGES

Petitioners do not seriously contest the findings of the Commission, sustained by the court of appeals, that promoting an efficient railroad rate structure and preventing cross-subsidization were central purposes of the Staggers Act. Instead, they argue that it was arbitrary and capricious for the Commission to further those purposes by treating the cost of moving empty cars to repair facilities just like all other costs of car ownership. Pet. at 18-21. Citing 49 U.S.C. § 11121(a)(1), they contend that under "historic common carrier doctrine" railroads must bear the full cost of owning and maintaining private cars, that the Staggers Act did not alter that obligation, and that the Commission erred in failing to guarantee that the allowances the car owners receive from the railroads will result in full recovery of the costs of movements to repair facilities. *Id.*

The short answer to this argument, as both the Commission and the court emphasized in their decisions below, is that neither the statute nor any "historic common carrier doctrine" require that private car owners be *guaranteed* full recovery of their ownership costs, and

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ance on the "administration and enforcement of all provisions of the Act," including section 10728. *Schaffer Transp. Co. v. United States*, 355 U.S. 83, 87-88 (1957); *see also American Commercial Lines, Inc. v. Louisville & N. R.R.*, 392 U.S. 571, 581-86 (1968); *Coal Exporters Ass'n v. United States*, 745 F.2d 76, 94 n.22 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1072 (1985).

there is no sound basis for treating empty-repair-move costs differently than other costs of ownership. *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1057, Pet. 18a-19a. Any issue of guaranteed recovery of ownership costs had previously been laid to rest in the *LOSAC* case. There, the Commission and the court of appeals emphatically rejected the car owners' argument that under 49 U.S.C. §§ 11121 and 11122 the allowance system must be completely insulated from market forces. *LO Shippers Action Comm. v. Aberdeen & Rockfish Ry.*, 4 I.C.C. 2d 1 (1987), *aff'd sub nom. LO Shippers Action Comm. v. ICC*, 857 F.2d 802 (D.C. Cir. 1988), *cert. denied*, 109 S. Ct. 2429 (1989).[34] The only cost recovery issue in the proceeding below was whether the system appropriate for ownership costs generally, as determined in *LOSAC*, was also appropriate for empty-repair-move costs. Nowhere do petitioners even suggest a reason why section 11121 should require a different result for empty-repair-move costs than for other costs of car ownership. Still less do they demonstrate that the decision of the Commission to treat them the same was arbitrary and capricious.

IV. THE COURT OF APPEALS CORRECTLY HELD THAT THE COMMISSION WAS NOT REQUIRED TO AWARD DAMAGES TO THE PRIVATE CAR OWNERS

In the court below, petitioners argued that the Commission was required to award $3 million in damages to them either because (1) this was an adjudication, and retrospective application of the Commission's new policy

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[34] The *LOSAC* decision was consistent with earlier rulings of the Commission and the courts. *See, e.g., Consolidated Rail Corp. v. United States*, 619 F.2d 988, 996 (3d Cir. 1980) (in regulating car compensation, the Commission must weigh the non-cost factors listed in the second sentence of subsection 11122(b), including "factors affecting the adequacy of the national freight car supply"); *Investigation Of Tank Car Allowance System*, 3 I.C.C.2d 196, 201 (1986); *Zone Of Reasonableness For Car Hire Charges*, 364 I.C.C. 299, 305 (1980).

was inappropriate or (2) this was a rulemaking, and new rules may be applied only prospectively. Petitioners have now abandoned the first argument, effectively conceding that if the Commission proceeding was an adjudication, they are not entitled to an award of damages. They again insist, however, that this proceeding was "transform[ed]" into a rulemaking and that the Commission was therefore required to award damages. Pet. at 22, 25. They also argue that the decision below somehow "conflicts" with this Court's decision in *Bowen v. Georgetown Univ. Hosp.*, 109 S. Ct. 468 (1988). Pet. at 21-22.

In the first place, their basic premise is wrong. The Commission did not act "retroactively." After passage of the Staggers Act, the agency issued a series of decisions upholding rates established by other rail carriers for movements to repair facilities. *Indiana Harbor I* became riddled with exceptions, and one Commissioner openly declared that the agency's 1977 ruling was "bad law and bad policy" that should be overturned. *CHTT Switching Charges* at 10-11. In 1983, in this new regulatory climate, IHB and BOCT independently published the rates at issue here. Following standard procedure in Commission rate cases, the car owners petitioned for suspension and investigation of these rates, but the Commission denied these petitions and the new rates became effective. A number of car owners then filed a formal complaint challenging these rates pursuant to 49 U.S.C. § 11701(b). In 1987, when the Commission finally issued its decision, it simply applied the current provisions of the Interstate Commerce Act and held that the challenged rates, which had been in effect for four years, were lawful. No aspect of the agency's decision was "retroactive."

Moreover, the Commission is authorized to award damages only if a carrier violates the Interstate Commerce Act. 49 U.S.C. §§ 10704(a)(1), 11701(a), 11705(b)(2). In this case, since the complainants failed to prove that

any statutory violations had occurred, the Commission was not authorized to award damages.[35]

Even if the agency had acted "retroactively" and even if the statute authorized the Commission to award damages in these circumstances, petitioners' argument would fail. Their fundamental assumption is that *Indiana Harbor I* established a "rule," which could be rescinded only prospectively and only in a subsequent rulemaking proceeding. Pet. at 22. Yet, as the court of appeals explained, *Indiana Harbor I* was an "adjudicatory proceeding," and when a policy is initially established by adjudication, "reversal by adjudication" is "particularly appropriate." *Chisholm v. FCC*, 538 F.2d at 365; *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1060, Pet. 24a.[36]

Claiming to have been "whipsaw[ed]," petitioners argue somewhat cryptically that the court of appeals treated this case as an adjudication for some purposes but "upheld the agency's change in position" by treating the case as a rulemaking proceeding. Pet. at 24. Nothing in the decision below, however, supports this argument. The court never deviated from its ruling that *Indiana Harbor II* was an adjudication; as the court explained, the case began as an adjudication "with the filing of a complaint" and "retained its fundamental adjudicatory character throughout." *General Am. Transp.*

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[35] Also, since the complainants offered no proof of actual injury, damages could not be awarded. *Parsons v. Chicago & N.W. Ry.*, 167 U.S. 447, 460 (1897); *see also Great Northern Ry. v. Sullivan*, 294 U.S. 458, 463 (1935). While the complainants paid the rates assessed by the IHB and BOCT, they were at least partially reimbursed by the railroads under the existing car compensation systems. J.A. 1252 n.13.

[36] "Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969); *see also Bowen*, 109 S. Ct. at 479 (Scalia, J., concurring) (where there is no pre-existing rule, "it is obviously available to the agency to 'make' law retroactively through adjudication").

Corp. v. ICC, 883 F.2d at 1030, Pet. 30a.[37] In any event, as petitioners suggest, it is only in an adjudication that an agency may determine past "rights and liabilities."[38] On the damages issue, the sole question was whether rates in effect *in the past* were lawful; as petitioners admit, this question could be resolved only in an adjudicatory proceeding.

The court below correctly recognized that the Commission did not treat this as a rulemaking proceeding and did not issue regulations.[39] The agency's decision to supplement the record by requesting public comment on issues having industry-wide significance did not change the nature of this proceeding.[40] Even if public

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[37] Petitioners claim to have been prejudiced by the Commission's reliance upon comments providing "legislative facts." Pet. at 23. Yet just as litigants in the Supreme Court may submit "Brandeis briefs" (*Muller v. Oregon*, 208 U.S. 412, 421 (1908); *Brown v. Board of Educ.*, 347 U.S. 483 (1954)), participants in adjudicatory proceedings before the Commission may provide information on the broader implications of Commission rulings. Furthermore, the critical evidence in this case specifically addressed the plight of the two individual railroads, the IHB and BOCT. The evidence showed that these railroads could price their services efficiently and obtain adequate compensation only by establishing separate rates for movements to repair facilities.

[38] Attorney General's Manual On The Administrative Procedure Act (1947) at 14, *quoted in Bowen*, 109 S. Ct. at 477 (Scalia, J., concurring); *see also* Pet. at 24.

[39] Although the Commission cited 5 U.S.C. § 553 in reopening the record, its 1984 notice in the Federal Register was not a notice of proposed rulemaking. It was captioned "Reopening; Possible Modification or Revocation of Case Law," and it expressly invoked the statutory provision governing reopening and reconsideration of prior Commission decisions. 49 *Fed. Reg.* 39,740 (October 10, 1984), *citing* 49 U.S.C. § 10327(g)(1).

[40] The car owners have never cited any "authority for their theory that an adjudication is converted into a rulemaking solely because an agency solicits and entertains the comments of those who have an interest in prospective application of the principle under study, and [the court below] found none." *General Am. Transp. Corp. v. ICC*, 872 F.2d at 1060, Pet. 25a.

comment had never been sought, the Commission would have been required to consider the allegations made in the complaint and decide whether the rates imposed by the IHB and BOCT were lawful.

Contrary to petitioners' argument, the decision below does not in any way conflict with this Court's *Bowen* decision. The only issue in *Bowen* was whether the Department of Health and Human Services ("HHS") was authorized to promulgate retroactive Medicare regulations. The Court held that since the Medicare Act did not expressly grant such authority, the regulations at issue were invalid. *Bowen* has no relevance here. Unlike HHS, the Commission did not conduct a rulemaking proceeding and did not issue regulations of any kind.

Nor does Justice Scalia's concurring opinion support petitioners. His opinion, like the lower court's opinion in *Bowen*,[41] stated that apart from the provisions of the Medicare Act, retroactive rulemaking is disfavored or prohibited under the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706. Justice Scalia's concurring opinion in *Bowen* is no more pertinent than the Court's decision itself. As explained above, the Commission never issued regulations; it simply decided this individual rate case.[42]

Petitioners also claim that the decision below conflicts with the Ninth Circuit's decision in *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982). They did not rely upon *Ford Motor Co.* in the court below and for good reason. Unlike the automobile companies in that case, which were targeted

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[41] *See Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 760 (D.C. Cir. 1987), *aff'd*, 109 S.Ct. 468 (1988).

[42] Petitioners quote Justice Scalia's opinion out of context and imply that he has condemned the use of adjudicatory proceedings to establish policy. Pet. at 22-24. His opinion actually suggests just the opposite. *See Bowen*, 109 S. Ct. at 476-78, *citing inter alia SEC v. Chenery Corp.*, 332 U.S. 194 (1947) and *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

as respondents in an adjudicatory proceeding initiated by a federal agency, petitioners themselves initiated this proceeding by filing a formal complaint against two individual railroads. Having forced the Commission to address these issues in an adjudicatory proceeding, petitioners are in no position to attack the Commission for failing to conduct a rulemaking,[43] and the alleged "conflict" is illusory.[44]

CONCLUSION

The petition for a writ of certiorari should be denied.

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[43] *See, e.g., Gundy v. United States*, 728 F.2d 484, 488 (10th Cir. 1984); *Wagner v. Taylor*, 836 F.2d 596, 599 (D.C. Cir. 1987).

[44] Petitioners also cite *Nueces County Navigation Dist. No. 1 v. ICC*, 674 F.2d 1055 (5th Cir.), *cert. denied*, 459 U.S. 1035 (1985). In that case, the Commission chose to invoke rulemaking procedures and was upheld on appeal. The Fifth Circuit never indicated, however, that the Commission would have been *prohibited* from using its adjudicatory powers. In fact, the court emphasized that "[t]he choice between rulemaking and adjudication 'is one that lies primarily in the informed discretion of the administrative agency.'" *Id.* at 1065, *quoting SEC v. Chenery Corp.*, 332 U.S. at 203.

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APPENDICES

APPENDIX A

1. The respondents submitting this brief are:

Association of American Railroads ("AAR")
Indiana Harbor Belt Railroad Company ("IHB")
The Baltimore and Ohio Chicago Terminal Railroad Company ("BOCT")

2. AAR is a trade association for the nation's railroads. Its membership includes most Class I railroads and numerous non-Class I railroads. Its members account for more than 90 percent of the freight revenues of all railroads in the United States. The AAR represents its member railroads before courts, agencies, and the Congress in matters of common concern. AAR's members include:

Full Membership:

Alton & Southern Railway
Atchison, Topeka & Santa Fe Railway Company, The
Bangor & Aroostook Railroad Company
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Burlington Northern Railroad Company
Cambria & Indiana Railroad Company
Canadian National Railway (Lines in U.S.)
Canadian Pacific Limited (Lines in U.S.)
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Consolidated Rail Corporation
CSX Transportation, Inc.
Denver & Rio Grande Western Railroad Company, The
Detroit & Mackinac Railway Company
Duluth, Missabe & Iron Range Railway Company
Elgin, Joliet & Eastern Railway
Galveston, Houston & Henderson Railroad

Grand Trunk Western Railroad
Green Bay & Western Railroad Company
Houston Belt & Terminal Railway Company
Kansas City Southern Railway Company
Lake Terminal Railroad Company, The
Louisiana & Arkansas Railway Company
Manufacturers Railway Company
McCloud River Railroad Company
McKeesport Connecting Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
National Railroad Passenger Corporation
Norfolk & Western Railway Company
Peoria & Pekin Union Railway Company
Pittsburgh & Lake Erie Railroad Company
Prescott & Northwestern Railroad Company
Richmond, Fredericksburg & Potomac Railroad Company
St. Louis Southwestern Railway Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
Texas Mexican Railway Company
Union Pacific Railroad Company
Union Railroad Company of Pittsburgh
Vermont Railway Incorporated
Winston-Salem Southbound Railway Company

Associate Members:

Alaska Railroad Corporation
Apalachicola Northern Railroad Company
Atlanta & St. Andrews Bay Railway Company
Belfast & Moosehead Lake Railroad Company
California Western Railroad
Central Western Railway Corporation
Centromen Puru Incorporated
Chicago, Central & Pacific Railroad Company
Chicago, Missouri & Western Railway

Chicago South Shore & South Bend Railroad
Chicago Rail Link
Cities Services Company Railroad
Colorado & Wyoming Railway Company
Dardanelle & Russellville Railroad Company
Delray Connecting Railroad Company
East Erie Commercial Railroad
East Jersey Railroad and Terminal Company
East St. Louis Junction Railroad Company
French National Railroads
Fruit Growers Express Company
Genesee & Wyoming Railroad Company
Government of Canada
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company
Hamersely Iron Pty. Ltd. (Western Australia)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.
India, Gov't of: Ministry of Railways (India)
Japanese National Railway (Japan)
Lake Superior & Ishpeming Railroad Company
Lenawee County Railroad Company, Incorporated
Louisiana & Delta Railroad
Louisiana & North West Railroad Company
Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
MidSouth Rail Corporation
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company
New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation
Pacific Fruit Express Company
Paducah & Louisville Railway, Incorporated
Pickens Railroad Company—National Railway Utilization Corporation
Pittsburg & Shawmut Railroad Company

Port Authority of New York & New Jersey, The
Providence & Worcester Railroad Company
Public Transport Commission of New South Wales (Australia)
Roberval & Saguenay Railway Company (Canada)
San Diego & Imperial Valley Railroad Company
Sierra Railroad Company (California)
South African Railways (Republic of South Africa)
Southern Indiana Railway, Inc.
Taiwan Railway Administration (Republic of China)
Texas & Northern Railway Company
Triton Transportation, Inc.
Upper Merion & Plymouth Railroad Company
Victoria A Minas Railway (Brazil)
Wabush Lake Railway Ltd. (Canada)
Washington Terminal Company

Special Canadian and Mexican Members:

Canadian Lines (In Canada)
Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
VIA Rail Canada
White Pass & Yukon Corporation Ltd.

Mexican Lines (In Mexico)
Ferrocarril Chihuahua Al Pacifico
Ferrocarril Sonara-Baja California, S.A. de C.V.
Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

3. The IHB is a common carrier operating in the Chicago area. Approximately 51 percent of its stock is owned by Consolidated Rail Corporation ("Conrail"), and

the remaining 49 percent is owned by Soo Line Railroad Company ("Soo").

Conrail has no parent company. The following subsidiaries or affiliates of Conrail have or may have outstanding securities in the hands of the public:

Akron & Barberton Belt Railroad Company
Albany Port Railroad Corporation
Belt Railway Company of Chicago, The
Calpro Company
Calumet Western Railway Company
Chicago & Western Indiana Railway Company
CG Projects, Inc.
CRR Industries, Inc.
CRR Investments, Inc.
CRR Properties, Inc.
Indiana Harbor Belt Railroad Company
Lakefront Dock & Railroad Terminal Company
Merchants Despatch Transportation Corporation
Monongahela Railway Company, The
Nicholas, Fayette & Greenbrier Railroad Company
Penn Central Communications Company
Pennsylvania Truck Lines, Inc.
Peoria & Pekin Union Railway Company
Peoria Midwest Transportation Corporation
Pittsburgh, Chartiers & Youghiogheny Railway Company
PD Land Services, Inc.
PTL Intermodal, Inc.
Railbox Company
Railgon Company
Railroad Association Insurance, Ltd.
St. Lawrence & Adirondack Railway Company
Trailer Train Company
Transportation Data Exchange, Inc.

Soo is a wholly owned subsidiary of Soo Line Corporation, 56 percent of whose stock is owned by Canadian

Pacific Limited. Related companies that are or may be publicly owned are:

All Systems Load-Lift Inc.
AMCA International Limited
AMCA Chimie et Plastiques, S.A.
Beachpoint Holdings Ltd.
BOMAG GMBH
Canada Maritime Limited
Canadian Pacific Forest Products Limited
Canadian Pacific Limited
Canadian Pacific Tanker Services, Inc.
Chicago, Terre Haute and Southeastern Railway Company
CPTel Holdings Inc.
Dominion Atlantic Railway Company, The
Dominion Bridge—DBS Inc.
Falt Towing Ltd.
Herring Marathon Group Inc.
Kingston and Pembroke Railway Company, The
Lake Champlain and St. Lawrence Junction Railway Company, The
Lake Erie and Northern Railway Company, The
Manitoba and North Western Railway Company of Canada
Marathon Aviation Terminals Limited
Massawippi Valley Railway Company
Mayo Forest Products Ltd.
Montreal and Atlantic Railway Company, The
NBIP Forest Products Inc.
Ontario and Quebec Railway Company
PanCanadian Petroleum Limited
Project 200 Properties Limited
REDCO International, Inc.
Soo Line Corporation
Polytec S.A.R.L.
St. Lawrence and Ottawa Railway Company, The
Toronto, Grey & Bruce Railway Company

4. The BOCT is wholly owned by CSX Transportation, Inc., which is a subsidiary of CSX Corporation. The following related companies are or may be publicly owned:

Allegheny and Western Railway Company
Baltimore and Cumberland Valley Rail Road Extension Company, The
Baltimore and Philadelphia Railroad Company, The
Baronial Transportation, Inc.
Central Rail Road Company of South Carolina, The
Cincinnati Inter-Terminal Railroad Company, The
Clearfield and Mahoning Railway Company
Cleveland Terminal and Valley Railroad Company
Country Wide Transport Services, Inc.
CSX Transportation
Dayton and Michigan Railroad Company
Dayton and Union Railroad Company
Home Avenue Railroad Company, The
Mid Allegheny Corporation
Richmond, Fredericksburg and Potomac Railroad Company
Yukon Pacific Corporation

APPENDIX B

§ 10101a. Rail transportation policy

In regulating the railroad industry, it is the policy of the United States Government—

(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail;

(2) to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required;

(3) to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, as determined by the Interstate Commerce Commission;

(4) to ensure the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes, to meet the needs of the public and the national defense;

(5) to foster sound economic conditions in transportation and to ensure effective competition and coordination between rail carriers and other modes;

(6) to maintain reasonable rates where there is an absence of effective competition and where rail rates provide revenues which exceed the amount necessary to maintain the rail system and to attract capital;

(7) to reduce regulatory barriers to entry into and exit from the industry;

(8) to operate transportation facilities and equipment without detriment to the public health and safety;

(9) to cooperate with the States on transportation matters to assure that intrastate regulatory jurisdiction is exercised in accordance with the standards established in this subtitle;

(10) to encourage honest and efficient management of railroads and, in particular, the elimination of noncompensatory rates for rail transportation;

(11) to require rail carriers, to the maximum extent practicable, to rely on individual rate increases, and to limit the use of increases of general applicability;

(12) to encourage fair wages and safe and suitable working conditions in the railroad industry;

(13) to prohibit predatory pricing and practices, to avoid undue concentrations of market power and to prohibit unlawful discrimination;

(14) to ensure the availability of accurate cost information in regulatory proceedings, while minimizing the burden on rail carriers of developing and maintaining the capability of providing such information; and

(15) to encourage and promote energy conservation.

(Added Pub.L. 96-448, Title I, § 101(a), Oct. 14, 1980, 94 Stat. 1897.)

§ 10327. Commission action and appellate procedure in rail carrier proceedings

(a) This section applies to a matter before the Interstate Commerce Commission involving a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title. However, other sections of this subtitle related to

actions of the Commission in proceedings involving rail carriers supersede this section to the extent that they are inconsistent with the provisions of this section related to deadlines.

(b) A division, individual Commissioner, employee board, or employee delegated under section 10305 of this title to make an initial decision in a matter related to one of those rail carriers shall complete all evidentiary proceedings related to the matter by the 180th day after assignment of the matter. The initial decision shall be submitted to the Commission in writing. If evidence is submitted in writing or testimony is taken at a public hearing, the initial decision shall be submitted to the Commission in writing by the 120th day after completion of all evidentiary proceedings and shall include—

(1) specific findings of fact;

(2) specific and separate conclusions of law;

(3) an order; and

(4) justification of the findings of fact, conclusion of law, and order.

(c) The Commission, or a division designated by the Commission, may void the requirement of an initial decision under subsection (b) of this section and may require the matter to be considered by the Commission or that division on finding that the matter involves a question of Commission policy, a new or novel issue of law, or an issue of general transportation importance, or that it is required for the timely execution of its functions.

(d) In a proceeding under this section, after the parties have had at least an opportunity to submit evidence in written form, the Commission shall give them an opportunity for briefs, written statements, or conferences of the parties. A conference of the parties must be chaired by a division, an individual Commissioner, an employee board, an employee delegated to act under section

10305 of this title, or an employee designated by the Commission.

(e) Copies of an initial decision under subsection (b) of this section shall be served on the interested parties. An initial decision becomes an action of the Commission on the 20th day after it is served on the interested parties, unless—

(1) an interested party files an appeal during the 20-day period, or by the end of an additional period of not more than 20 days, if authorized by the Commission or division designated by the Commission; or

(2) the Commission stays or postpones the initial decision under subsection (g)(2) or (j) of this section within the period or additional period referred to in clause (1) of this subsection.

(f)(1) Before an initial decision becomes an action of the Commission, the Commission, or a division or board designated by the Commission, may review the initial decision on its own initiative, and shall review an initial decision if an appeal is filed under subsection (e)(1) of this section. However, a board may not decide an appeal from an initial decision if the appeal may be further appealed to the Commission.

(2) An initial decision may be reviewed on the record on which it is based or by a further hearing. If an initial decision is reviewed, it shall be stayed pending final determination of the matter, and it is an action of the Commission only after the final determination is made. If an appeal is filed under subsection (e)(1) of this section, the final determination shall be made by the 180th day after the appeal is filed.

(3) Review of, or appeal from, an initial decision shall be conducted under section 557 of title 5. The Commission may prescribe rules limiting and defining the issues and pleadings on review under section 557(b) of that title.

(g) (1) The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances—

(A) reopen a proceeding;

(B) grant rehearing, reargument, or reconsideration of an action of the Commission; and

(C) change an action of the Commission.

An interested party may petition to reopen and reconsider an action of the Commission under this paragraph under regulations of the Commission.

(2) The Commission may grant a rehearing, reargument, or reconsideration of an action of the Commission that was taken by a division designated by the Commission if it finds that—

(A) the action involves a matter of general transportation importance; or

(B) the action would be affected materially because of clear and convincing new evidence or changed circumstances.

An interested party may petition for rehearing, reargument, or reconsideration of an action of the Commission under this paragraph under regulations of the Commission. The Commission may stay an action pending a final determination under this paragraph. The Commission shall complete reconsideration and take final action by the 120th day after the petition is granted.

(h) An action of the Commission under this section and an action of a designated division under subsection (c) of this section is effective on the 30th day after service on the parties to the proceeding unless the Commission provides for it to become effective on an earlier date.

(i) Notwithstanding this subtitle, an action of the Commission under this section and an action of a desig-

nated division under subsection (c) of this section is final on the date on which it is served, and a civil action to enforce, enjoin, suspend, or set aside the action may be filed after that date.

(j) The Commission may extend a time period established by this section for a period of not more than 90 days. The extension shall be granted if a majority of the Commissioners agreed to it by public vote.

(k) If an extension granted under subsection (j) of this section is not sufficient to allow for completion of necessary proceedings, the Commission may grant a further extension in an extraordinary situation if—

(1) a majority of the Commissioners agree to the further extension by public vote; and

(2) not later than the 15th day before expiration of the extension granted under subsection (j) of this section, the Commission submits a written report to the Congress that a further extension has been granted. The report shall include—

(A) a full explanation of the reasons for the further extension;

(B) the anticipated duration of the further extension;

(C) the issues involved in the matter before the Commission; and

(D) the names of personnel of the Commission working on the matter.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1348; Pub.L. 96-258, § 1(2), June 3, 1980, 94 Stat. 425; Pub.L. 96-296, § 25(e), July 1, 1980, 94 Stat. 818; Pub.L. 97-375, Title I, § 113, Dec. 21, 1982, 96 Stat. 1821.)

§ 10701a. Standards for rates for rail carriers

(a) Except as provided in subsection (b) or (c) of this section and unless a rate is prohibited by a provision of this title, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may establish any rate for transportation or other service provided by the carrier.

(b) (1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

(2) In any proceeding to determine the reasonableness of a rate described in paragraph (1) of this subsection—

(A) the shipper challenging such rate shall have the burden of proving that such rate is not reasonable if—

(i) such rate (I) is authorized under section 10707a of this title, and (II) results in a revenue-variable cost percentage for the transportation to which the rate applies that is less than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; or

(ii) such rate does not meet the description set forth in clause (i) of this subparagraph, but the Commission does not begin an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable; and

(B) the rail carrier establishing the challenged rate shall have the burden of proving that such rate is reasonable if—

(i) such rate (I) is greater than that authorized under section 10707a of this title, or (II) results in a revenue-variable cost percent-

age for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; and

(ii) the Commission begins an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable.

(3) In determining whether a rate established by a rail carrier is reasonable for purposes of this section, the Commission shall recognize the policy of this title that rail carriers shall earn adequate revenues, as established by the Commission under section 10704(a)(2) of this title.

(c)(1) A rate for transportation or other service provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may not be established below a reasonable minimum. Any rate for transportation by such a rail carrier that does not contribute to the going concern value of such carrier is presumed to be not reasonable. A rate that contributes to the going concern value of such carrier is conclusively presumed not to be below a reasonable minimum.

(2) A rate for transportation by a rail carrier that equals or exceeds the variable cost of providing the transportation is conclusively presumed to contribute to the going concern value of such rail carrier.

(3)(A) Upon the filing of a complaint alleging that a rate is in violation of this subsection, the Commission shall take final action thereon by the 90th day after the date such complaint is filed.

(B) If the Commission determines, based on the record after opportunity for a hearing, that a rate is in violation of this subsection, the Commission shall order such

rate to be raised, but only to the minimum level required by this subsection. The complainant shall have the burden of proving that such rate is in violation of this subsection.

(4)(A) For purposes of this subsection, variable costs shall be determined under formulas or procedures prescribed or certified by the Commission.

(B) In the determination of variable costs for purposes of minimum rate regulation, the Commission shall, on application of the rail carrier proposing the rate, determine only the costs of such carrier and only those costs of the specific service in question unless the specific information is not available. The Commission may not include in such variable costs an expense that does not vary directly with the level of transportation provided under the proposed rate.

(Added Pub.L. 96-448, Title II, § 201(a), Oct. 14, 1980, 94 Stat. 1898.)

§ 10704. Authority and criteria: rates, classifications, rules, and practices prescribed by Interstate Commerce Commission

(a)(1) When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classifica-

tion and observe the rule or practice prescribed by the Commission.

(2) The Commission shall maintain and revise as necessary standards and procedures for establishing revenue levels for rail carriers providing transportation subject to its jurisdiction under that subchapter that are adequate, under honest, economical, and efficient management, to cover total operating expenses, including depreciation and obsolescence, plus a reasonable and economic profit or return (or both) on capital employed in the business. The Commission shall make an adequate and continuing effort to assist those carriers in attaining revenue levels prescribed under this paragraph. However, a rate, classification, rule, or practice of a rail carrier may be maintained at a particular level to protect the traffic of another carrier or mode of transportation only if the Commission finds that the rate or classification, or rule or practice related to it, reduces or would reduce the going concern value of the carrier charging the rate. Revenue levels established under this paragraph should—

(A) provide a flow of net income plus depreciation adequate to support prudent capital outlays, assure the repayment of a reasonable level of debt, permit the raising of needed equity capital, and cover the effects of inflation; and

(B) attract and retain capital in amounts adequate to provide a sound transportation system in the United States.

(3) The Commission shall conclude a proceeding under paragraph (2) of this subsection within 180 days after the effective date of Staggers Rail Act of 1980 and thereafter as necessary.

(4) On the basis of the standards and procedures under paragraph (2) of this subsection, the Commission shall, within 180 days after the effective date of the

Staggers Rail Act of 1980 and on an annual basis thereafter, determine which rail carriers are earning adequate revenues.

(b)(1) When the Commission decides that a rate charged or collected by—

(A) a motor common carrier for providing transportation subject to its jurisdiction under subchapter II of chapter 105 of this title by itself, with another motor common carrier, with a rail, express, or water common carrier, or any of them;

(B) a water common carrier for providing transportation subject to its jurisdiction under subchapter III of chapter 105 of this title; or

(C) a household goods freight forwarder for providing service subject to its jurisdiction under subchapter IV of chapter 105 of this title;

or that a classification, rule, or practice of that carrier, does or will violate this chapter, the Commission shall prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed.

(2)(A) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier, the Commission shall consider, among other factors, the effect of the prescribed rate, classification, rule, or practice on the movement of traffic by that carrier.

(B) When prescribing a rate, classification, rule, or practice for transportation or service by common carriers other than by rail carrier or motor carrier, the Commission shall consider, among other factors, the need for revenues that are sufficient, under honest, economical and efficient management, to let the carrier provide that transportation or service.

(3) If the carrier is a motor or water common carrier or a household goods freight forwarder, the Commission shall also consider the need, in the public interest, of adequate and efficient transportation or service by that carrier at the lowest cost consistent with providing that transportation or service.

(4) If the carrier is a motor common carrier or a household goods freight forwarder, the Commission shall also consider the inherent advantages of transportation by motor common carrier or the inherent nature of household goods freight forwarding, respectively.

(c)(1) When the Commission finds that a minimum rate of a contract carrier for transportation subject to the jurisdiction of the Commission under subchapter II or III of chapter 105 of this title, or a rule or practice related to the rate or the value of the service under it, violates this chapter or the transportation policy of section 10101 of this title, the Commission may prescribe the minimum rate, rule, or practice for the carrier that is desirable in the public interest and will promote that policy. In prescribing the rate, the Commission may not give a motor or water contract carrier an advantage or preference in competition with a motor or water common carrier, respectively, if an advantage or preference is unreasonable or inconsistent with the public interest and the transportation policy of section 10101 of this title.

(2) When prescribing a minimum rate, or rule or practice related to a rate, for a contract carrier, the Commission shall consider—

(A) the cost of the transportation provided by the carrier; and

(B) the effect of a prescribed minimum rate, or rule or practice, on the movement of traffic by that carrier.

(d) In a proceeding involving competition between carriers of different modes of transportation subject to this subtitle, except rail carriers, the Commission, in determining whether a rate is less than a reasonable minimum rate, shall consider the facts and circumstances involved in moving the traffic by the mode of carrier to which the rate is applicable. Subject to the transportation policy of section 10101 of this title, rates of a carrier may not be maintained at a particular level to protect the traffic of another mode of transportation.

(e) In a proceeding involving a proposed increase or decrease in rail carrier rates, the Commission shall specifically consider allegations that the increase or decrease would (1) change the rate relationships between commodities, ports, places, regions, areas, or other particular descriptions of traffic (without regard to previous Commission consideration or approval of those relationships), and (2) have a significant adverse effect on the competitive position of shippers or consignees served by the rail carrier proposing the increase or decrease. The Commission shall investigate to determine whether the change or effect violates this subtitle when it finds that those allegations are substantially supported on the record. The investigation may be made either before or after the proposed increase or decrease becomes effective and either in that proceeding or in another proceeding.

(f) The Commission may begin a proceeding under this section on its own initiative or on complaint. A complaint under subsection (a) of this section must be made under section 11701 of this title, but the proceeding may also be in extension of a complaint pending before the Commission. A complaint under subsection (c) of this section must contain a full statement of the facts and the reasons for the complaint and must be made under oath.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1373; Pub.L. 96-296, § 13(b), July 1, 1980, 94 Stat. 803; Pub.L. 96-448, Title II, § 205(b), Oct. 14, 1980, 94 Stat. 1906; Pub.L. 97-261, § 9(b), Sept. 20, 1982, 96 Stat. 1109; Pub.L. 99-521, § 7(b), Oct. 22, 1986, 100 Stat. 2994).

§ 10706. Rate agreements: exemption from antitrust laws

(a)(1) In this subsection—

(A) "affiliate" means a person controlling, controlled by, or under common control or ownership with another person and "ownership" refers to equity holdings in a business entity of at least 5 percent.

(B) "single-line rate" refers to a rate or allowance proposed by a single rail carrier that is applicable only over its line and for which the transportation (exclusive of terminal services by switching, drayage or other terminal carriers or agencies) can be provided by that carrier.

(C) "practicably participates in that movement" shall have such meaning as the Commission shall by regulation prescribe.

(2)(A) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title that is a party to an agreement of at least 2 rail carriers or an agreement with a class of carriers referred to in subsection (d)(1)(B)-(E) of this section, that relates to rates (including charges between rail carriers and compensation paid or received for the use of facilities and equipment), classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, publication, or establishment of them, shall apply to the Commission for approval of that agreement under this subsection. The Commission shall approve the agreement only when it finds that the making and carrying

out of the agreement will further the transportation policy of section 10101a of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of its approval. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the Sherman Act (15 U.S.C. 1, et seq.), the Clayton Act (15 U.S.C. 12, et seq.), the Federal Trade Commission Act (15 U.S.C. 41, et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) do not apply to parties and other persons with respect to making or carrying out the agreement. However, the Commission may not approve or continue approval of an agreement when the condtions required by it are not met or if it does not receive a verified statement under subparagraph (B) of this paragraph.

(B) The Commission may approve an agreement under subparagraph (A) of this paragraph only when the carriers applying for approval file a verified statement with the Commission. Each statement must specify for each rail carrier that is a party to the agreement—

(i) the name of the carrier;

(ii) the mailing address and telephone number of its headquarter's office; and

(iii) the names of each of its affiliates and the names, addresses, and affiliates of each of its officers and directors and of each person, together with an affiliate, owning or controlling and debt, equity, or security interest in it having a value of at least $1,000,000.

(3)(A) An organization established or continued under an agreement approved under this subsection shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed. Such an organization may not—

(i) permit a rail carrier to discuss, to participate in agreements related to, or to vote on single line rates proposed by another rail carrier, except that for purposes of general rate increases and broad tariff changes only, if the Commission finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part;

(ii) permit a rail carrier to discuss, to participate in agreements related to, or to vote on rates related to a particular interline movement unless that rail carrier practicably participates in that movement; or

(iii) if there are interline movements over two or more routes between the same end points, permit a carrier to discuss, to participate in agreements related to, or to vote on rates except with a carrier which forms part of a particular single route. This clause shall take effect on January 1, 1984, or on such earlier date as the Commission determines. If the Commission finds at any time that the implementation of this clause is not feasible, it may delay or suspend such implementation in whole or in part.

(B) Until January 1, 1984, subparagraph (A)(ii) and (A)(iii) of this paragraph do not apply to—

(i) general rate increases to cover inflationary cost increases, or general rate decreases, for joint rates if the agreement gives shippers, under specified procedures, at least 15 days notice of the proposal and an opportunity to present comments on it before a tariff containing the increases or decreases is filed with the Commission; or

(ii) broad tariff changes that are of at least substantially general application throughout the area where the changes will apply, except single line rates where subparagraph (A)(i) of this paragraph prohibits the participation of carriers with single line rates.

If the Commission finds at any time that the implementation of this subparagraph is not feasible, it may delay or suspend such implementation in whole or in part.

(C)(i) In any proceeding in which a party alleges that a rail carrier voted or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

(ii) In any proceeding in which it is alleged that a carrier was a party to an agreement, conspiracy, or combination in violation of a Federal law cited in subsection (a)(2)(A) of this section or of any similar State law, proof of an agreement, conspiracy, or combination may not be inferred from evidence that two or more carriers acted together with respect to an interline rate or related matter and that a party to such action took similar action with respect to a rate or related matter on another route or traffic. In any proceeding in which such a violation is alleged, evidence of a discussion or agreement between or among such carrier and one or more other carriers, or of any rate or other action resulting from such discussion or agreement, shall not be admissible if the discussion or agreement—

(I) was in accordance with an agreement approved under paragraph (2) of this subsection; or

(II) concerned an interline movement of the carrier, and the discussion or agreement would not, considered by itself, violate the laws referred to in the first sentence of this clause.

In any proceeding before a jury, the court shall determine whether the requirements of clause (I) or (II) are satisfied before allowing the introduction of any such evidence.

(D) An organization described in subparagraph (A) of this paragraph shall provide that transcripts or sound recordings be made of all meetings, that records of votes be made, and that such transcripts or recordings and voting records be submitted to the Commission and made available to other Federal agencies in connection with their statutory responsibilities over rate bureaus, except that such material shall be kept confidential and shall not be subject to disclosure under section 552 of title 5, United States Code.

(4) Notwithstanding any other provision of this subsection, one or more rail carriers may enter into an agreement, without obtaining prior Commission approval, that provides solely for compilation, publication, and other distribution of rates in effect or to become effective. The Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), sections 73 and 74 of the Wilson Tariff Act (15 U.S.C. 8 and 9), and the Act of June 19, 1936, as amended (15 U.S.C. 13, 13a, 13b, 21a) shall not apply to parties and other persons with respect to making or carrying out such agreement. However, the Commission may, upon application or on its own initiative, investigate whether the parties to such an agreement have exceeded its scope, and upon a finding that they have, the Commission may issue such orders as are necessary, including an order dissolving the agreement, to ensure that actions taken pursuant to the agreement are limited as provided in this paragraph.

(5)(A) Whenever two or more shippers enter into an agreement to discuss among themselves that relates to the amount of compensation such shippers propose to be paid by rail carriers providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, for use by such rail carriers of rolling stock owned or leased by such shippers, the

shippers shall apply to the Commission for approval of that agreement under this paragraph. The Commission shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy set forth in section 10101a of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of approval. If the Commission approves the agreement, it may be made and carried out under its terms and under the terms required by the Commission, and the antitrust laws set forth in paragraph (2) of this subsection do not apply to parties and other persons with respect to making or carrying out the agreement. The Commission shall approve or disapprove an agreement under this paragraph within one year after the date application for approval of such agreement is made.

(B) If the Commission approves an agreement described in subparagraph (A) of this paragraph and the shippers entering into such agreement and the rail carriers proposing to use rolling stock owned or leased by such shippers, under payment by such carriers or under a published allowance, are unable to agree upon the amount of compensation to be paid for the use of such rolling stock, any party directly involved in the negotiations may require that the matter be settled by submitting the issues in dispute to the Commission. The Commission shall render a binding decision, based upon a standard of reasonableness and after taking into consideration any past precedents on the subject matter of the negotiations, no later than 90 days after the date of the submission of the dispute to the Commission.

(C) Nothing in this paragraph shall be construed to change the law in effect prior to the effective date of the Staggers Rail Act of 1980 with respect to the obligation of rail carriers to utilize rolling stock owned or leased by shippers.

(b)(1) In this subsection, "single-line rate" refers to a rate, charge, or allowance proposed by a single motor common carrier that is applicable only over its line and for which the transportation can be provided by that carrier.

(2) As provided by this subsection, a motor common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title may enter into an agreement with one or more such carriers concerning rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them. Such agreement may be submitted to the Commission for approval by any carrier or carriers which are parties to such agreement and shall be approved by the Commission upon a finding that the agreement fulfills each requirement of this subsection, unless the Commission finds that such agreement is inconsistent with the transportation policy set forth in section 10101(a) of this title. The Commission may require compliance with reasonable conditions consistent with this subtitle to assure that the agreement furthers such transportation policy. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

(3) Agreement submitted to the Commission under this subsection may be approved by the Commission only if each of the following conditions are met:

(A) Each carrier which is a party to an agreement must file with the Commission a verified state-

ment that specifies its name, mailing address, and telephone number of its main office; the names of each of its affiliates; the names, addresses, and affiliates of each of its officers and directors; the names, addresses, and affiliates of each person, together with an affiliate, owning or controlling any debt, equity, or security interest in it having a value of at least $1,000,000. In this subparagraph, "affiliate" means a person controlling, controlled by, or under common control or ownership with another person and "ownership" means equity holdings in a business entity of at least 5 percent.

(B) Any organization established or continued under an agreement approved under this subsection must comply with the following requirements:

(i) subject to the provisions of subparagraphs (C), (D), (E), and (F) of this paragraph, (I) the organization may allow any member carrier to discuss any rate proposal docketed, but (II) after January 1, 1981, only those carriers with authority to participate in the transportation to which the rate proposal applies may vote upon such rate proposal;

(ii) the organization may not interfere with each carrier's right of independent action and may not change or cancel any rate established by independent action after the date of enactment of this subsection, other than a general increase or broad rate restructuring, except that changes in such rates may be effected, with the consent of the carrier or carriers that initiated the independent action, for the purpose of tariff simplification, removal of discrimination, or elimination of obsolete items;

(iii) the organization may not file a protest or complaint with the Commission against any

tariff item published by or for the account of any motor carrier;

(iv) the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item published by or for the account of any of its member carriers;

(v) upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization;

(vi) the organization may not allow a carrier to vote for one or more other carriers without specific written authority from the carrier being represented; and

(vii) the organization shall make a final disposition of a rule or rate docketed with it by the 120th day after the proposal is docketed, except that if unusual circumstances require, the organization may extend such period, subject to review by the Commission.

(C) No agreement approved under this subsection may provide for discussion of or voting on rates to which the provisions of section 10708(d) or 10730 (b) of this title apply, except that rates established or filed under section 10730 of this title before the date of enactment of the Motor Carrier Act of 1980 or changes with respect to such rates may be discussed or voted on under agreements approved under this subsection until January 1, 1984.

(D) No agreement approved under this subsection may provide for discussion of or voting upon single-line rates on or after January 1, 1984, except that such date shall be July 1, 1984, if the Motor Carrier Ratemaking Study Commission does not submit its final report under section 14(b)(4) of the Motor Carrier Act of 1980 on or before January 1, 1983. This subparagraph shall not apply to any single-line rate proposed by a motor common carrier of passengers. This subparagraph and subparagraph (B)(i)(II) of this paragraph shall not apply to the following:

(i) general rate increases or decreases if the agreement gives shippers, under specified procedures, at least 15 days' notice of the proposal and an opportunity to present comments on it before a tariff containing the increases or decreases is filed with the Commission and if discussion of such increases or decreases is limited to industry average carrier costs and, after the date of elimination of the antitrust immunity by this subparagraph, does not include discussion of individual markets or particular single-line rates;

(ii) changes in commodity classification;

(iii) changes in tariff structures if discussion of such changes is limited to industry average carrier costs and, after the date of elimination of antitrust immunity by this subparagraph, does not include discussion of individual markets or particular single-line rates;

(iv) publishing of tariffs, filing of independent actions for individual members carriers, providing of support services for members, and changes in rules or regulations which are of at

least substantially general application throughout the area in which such changes will apply.

(E) On and after January 1, 1983, no agreement approved under this subsection may provide for discussion of or voting upon any single-line rate proposed by a motor common carrier of passengers. On and after January 1, 1984, no agreement approved under this subsection may provide for discussion of or voting upon any joint rate proposed by one or more motor common carriers of passengers. This subparagraph shall not apply to any rate applicable to special or charter transportation. This subparagraph and subparagraph (B)(i)(II) of this paragraph shall not apply to the following:

(i) any general rate increase or decrease, broad change in tariff structure, or promotional or innovative fare change, as defined by the Commission and subject to such notice requirements as the Commission may specify by regulation, if discussion of such general increase or decrease is limited to industry average carrier costs and intermodal competitive factors and does not include discussion of individual markets or particular single-rates or joint rates; and

(ii) publishing of tariffs, filing of independent actions for individual member carriers, providing of support services for members, and changes in rules or regulations which are of at least substantially general application throughout the area in which such changes will apply.

(F) After the effective date of this subparagraph, no agreement approved under this subsection may provide for discussion of or voting upon any rate applicable to special or charter transportation proposed by a motor common carrier of passengers. This sub-

paragraph shall not apply to publication of any such rate.

(G) In any proceeding in which a party to such proceeding alleges that a carrier voted, discussed, or agreed on a rate or allowance in violation of this subsection, that party has the burden of showing that the vote, discussion, or agreement occurred. A showing of parallel behavior does not satisfy that burden by itself.

(H) The Commission shall, by regulation, determine reasonable quorum standards to be applied for meetings of organizations established or continued under an agreement approved under this subsection.

(4) Notwithstanding any other provision of this subtitle, before the date on which the antitrust immunity is eliminated for discussion of or voting on single-line rates by paragraph (3)(D) of this subsection, the Commission may not take any action which would, on the basis of the type of carrier service involved (including service by carriers singly or in combination with other carriers), result in the exclusion of one or more motor common carriers of property from discussion or voting under agreements authorized by this subsection on matters concerning rates, allowances, classifications, or divisions, except that before such date, the Commission may issue regulations which take effect on or after such date to carry out the provisions of such paragraph.

(5) Notwithstanding any other provision of this subtitle (other than paragraph (3)(F) of this subsection, relating to special and charter transportation of passengers), before January 1, 1983, the Commission may not take any action which would, on the basis of the type of carrier service involved (including service by carriers singly or in combination with other carriers), result in the exclusion of one or more motor common carriers of passengers from discussion or voting under agreements

authorized by this subsection on matters concerning rates, allowances, or divisions, except that before January 1, 1983, the Commission may issue regulations which take effect on or after January 1, 1983, to carry out the provisions of paragraph (3)(E) of this subsection.

(c) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title (except a rail carrier or a motor common carrier) that is a party to an agreement of at least 2 carriers related to rates (including charges between carriers and compensation paid or received for the use of facilities and equipment), allowances, classifications, divisions, or rules related to them, or procedures for joint consideration, initiation, or establishment of them, may apply to the Commission for approval of that agreement under this subsection. The Commission shall approve the agreement only when it finds that the making and carrying out of the agreement will further the transportation policy of section 10101 of this title and may require compliance with conditions necessary to make the agreement further that policy as a condition of approval. If the Commission approves the agreement, it may be made and carried out under its terms and under the conditions required by the Commission, and the antitrust laws, as defined in the first section of the Clayton Act (15 U.S.C. 12), do not apply to parties and other persons with respect to making or carrying out the agreement.

(d)(1) In this subsection, carriers are classified as follows:

(A) Rail, express, and sleeping car carriers are a class.

(B) Pipeline carriers are a class.

(C) Motor carriers are a class.

(D) Water carriers are a class.

(E) Household goods freight forwarders are a class.

(2) The Commission may not approve an agreement under this section—

(A) between or among carriers of different classes unless, in addition to the finding required under subsection (a), (b), or (c) of this section, the Commission finds that the agreement is limited to matters related to transportation under joint rates or over through routes;

(B) related to a pooling, division, or other matter to which subchapter III of chapter 113 of this title applies; or

(C) establishing a procedure for determination of a matter through joint consideration unless the Commission finds that each party to the agreement has the absolute right under it to take independent action before or after a determination is made under that procedure.

(e) The Commission may require an organization established or continued under an agreement approved under this section to maintain records and submit reports. The Commission, or its delegate, may inspect a record maintained under this section.

(f) The Commission may review an agreement approved under subsection (a), (b), or (c) of this section and shall change the conditions of approval or terminate it when necessary to comply with (1) the public interest and subsection (a), or (2) subsection (b) or (c). The Commission shall postpone the effective date of a change of an agreement under this subsection for whatever period it determines to be reasonably necessary to avoid unreasonable hardship.

(g) The Commission may begin a proceeding under this section on its own initiative or on application. Action of

the Commission under this section (1) approving an agreement, (2) denying, ending, or changing approval, (3) prescribing the conditions on which approval is granted, or (4) changing those conditions, has effect only as related to application of the antitrust laws referred to in subsection (a), (b), or (c) of this section.

(h) The Commission shall review each agreement approved under subsection (a) of this section periodically, but at least once every 3 years (1) to determine whether the agreement or an organization established or continued under one of those agreements still complies with the requirements of that subsection and the public interest, and (2) to evaluate the success and effect of that agreement or organization on the consuming public and the national rail freight transportation system. If the Commission finds that an agreement or organization does not conform to the requirements of that subsection, it shall end or suspend its approval. The Commission shall report to the President and Congress the results of the review as a part of its annual report under section 10311 of this title.

(i) (1) The Federal Trade Commission, in consultation with the Antitrust Division of the Department of Justice, shall prepare periodically an assessment of, and shall report to the Commission on—

(A) possible anticompetitive features of—

(i) agreements approved or submitted for approval under subsection (a) of this section; and

(ii) an organization operating under those agreements; and

(B) possible ways to alleviate or end an anticompetitive feature, effect, or aspect in a manner that will further the goals of this subtitle and of the transportation policy of section 10101a of this title.

(2) Reports received by the Commission under this subsection shall be published and made available to the public under section 552(a) of title 5.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1377; Pub.L. 96-258, § 1(7), June 3, 1980, 94 Stat. 426; Pub.L. 96-296, § 14(a), (c), (d), July 1, 1980, 94 Stat. 803, 808; Pub.L. 96-448, Title II, §§ 219(a)-(e), 224(b), Oct. 14, 1980, 94 Stat. 1926-1929; Pub.L. 97-261, § 10(a)-(d), Sept. 20, 1982, 96 Stat. 1109, 1110; Pub.L. 98-216, § 2(12), Feb. 14, 1984, 98 Stat. 5; Pub.L. 99-521, § 7(c), Oct. 22, 1986, 100 Stat. 2995.)

§ 10707. Investigation and suspension of new rail carrier rates, classifications, rules, and practices

(a) When a new individual or joint rate or individual or joint classification, rule, or practice related to a rate is filed with the Interstate Commerce Commission by a rail carrier providing transportation subject to its jurisdiction under subchapter I of chapter 105 of this title, the Commission may begin a proceeding, on its own initiative or on complaint of an interested party, to determine whether the proposed rate, classification, rule, or practice violates this subtitle. The Commission must give reasonable notice to interested parties before beginning a proceeding under this subsection but may act without allowing an interested party to file an answer or other formal pleading in response to its decision to begin the proceeding.

(b)(1) The Commission must complete a proceeding under this section and make its final decision by the end of the 5th month after the rate, classification, rule, or practice was to become effective, except that if the Commission reports to the Congress by the end of such 5th month that it cannot make a final decision by that time and explains the reason for the delay, it may take an additional 3 months to complete the proceeding and make its final decision. If the Commission does not reach a final decision within the applicable time period, the rate, classification, rule, or practice—

(A) is effective at the end of that time period; or

(B) if already in effect at the end of that time period, remains in effect.

(2) If an interested party has filed a complaint under subsection (a) of this section, the Commission may set aside a rate, classification, rule, or practice that has become effective under this section if the Commission finds it to be in violation of this chapter.

(c)(1) The Commission may not suspend a proposed rate, classification, rule, or practice during the course of a Commission proceeding under this section unless it appears from the specific facts shown by the verified statement of a person that—

(A) it is substantially likely that the protestant will prevail on the merits;

(B) without suspension, the proposed rate change will cause substantial injury to the protestant or the party represented by the protestant; and

(C) because of the peculiar economic circumstances of the protestant, the provisions of subsection (d) of this section do not protect the protestant.

(2) The burden shall be on the protestant to prove the matters described in paragraph (1)(A), (B), and (C) of this subsection.

(d)(1) If the Commission does not suspend a proposed rate increase under subsection (c) of this section, the Commission shall require the rail carrier to account for all amounts received under the increase until the Commission completes its proceedings under subsection (b) of this section. The accounting shall specify by whom and for whom the amounts are paid. When the Commission takes final action, it shall require the carrier to refund to the person for whom the amounts were paid that part of the increased rate found to be unreasonable, plus interest at a rate equal to the average yield (on the date

the statement is filed) of marketable securities of the United States Government having a duration of 90 days.

(2) If a rate is suspended under subsection (c) of this section and any portion of such rate is later found to be reasonable under this title, the carrier shall collect from each person using the transportation to which the rate applies the difference between the original rate and the portion of the suspended rate found to be reasonable for any services performed during the period of suspension, plus interest at a rate equal to the average yield (on the date the statement is filed) of marketable securities of the United States Government having a duration of 90 days, except that this paragraph shall not apply to general rate increases under section 10706 of this title.

(3) If any portion of a proposed rate decrease is suspended under subsection (c) of this section and later found to be reasonable under this title, the rail carrier may refund any part of the portion of the decrease found to comply with this title if the carrier makes the refund available to each shipper who participated in the rate, in accordance with the relative amount of such shipper's traffic transported at such rate.

(4) Notwithstanding the provisions of section 10741 or section 10761 of this title, the Commission shall, by rule, establish standards and procedures permitting a rail carrier to waive the collection of amounts due under this subsection if such amounts are not significant.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1380; Pub.L. 96-448, Title II, § 207, Oct. 14, 1980, 94 Stat. 1907.)

§ 10707a. Zone of rail carrier rate flexibility

(a) in this section—

(1)(A) "base rate" means, with respect to the transportation of a particular commodity (i) for the 24-month period beginning on October 1, 1980, the

rate in effect on October 1, 1980, (ii) for the 24-month period beginning on October 1, 1982, the rate in effect on October 1, 1982, and (iii) for the 5-year period beginning on October 1, 1984, and for each subsequent 5-year period, the rate in effect on the first day of the applicable 5-year period.

(B) If no rate exists for the transportation of a particular commodity on October 1, 1980, the base rate for the transportation of such commodity shall be the rate established by the rail carrier (divided by the latest rail cost adjustment factor published by the Commission), unless such rate is found to be unreasonable by the Commission, in which case the base rate shall be the rate authorized by the Commission (divided by the latest rail cost adjustment factor published by the Commission).

(2)(A) "adjusted base rate" means the base rate for the transportation of a particular commodity multiplied by the latest rail cost adjustment factor published by the Commission pursuant to this paragraph.

(B) Commencing with the fourth quarter of 1980, the Commission shall, as often as practicable but in no event less often than quarterly, publish a rail cost adjustment factor which shall be a fraction, the numerator of which is the latest published Index of Railroad Costs (which index shall be compiled or verified by the Commission, with appropriate adjustments to reflect the changing composition of railroad costs, including the quality and mix of material and labor), and the denominator of which is the same index for the fourth quarter of 1980, or for the fourth quarter of 1982 or for the fourth quarter of every fifth year thereafter, as appropriate.

(b)(1) Except as provided in paragraph (2)[1] of this subsection, a rail carrier providing transportation sub-

[1] So in original. Probably should be "3".

ject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may increase any rate over which the Commission has jurisdiction under section 10709 of this title so long as the increased rate is not greater than the adjusted base rate for the transportation involved, plus any rate increases implemented under subsection (c) or (d) of this section.

(2) A rate increase authorized under this subsection may not be found to exceed a reasonable maximum for the transportation involved.

(3) A rail carrier may not increase a rate under this subsection to the extent that the cost increases to such carrier due to inflation are recovered through (A) general rate increases pursuant to section 10706 of this title, or (B) inflation-based rate increases under section 10712 of this title applicable to that rate.

(c)(1) During the 12-month period beginning on the effective date of the Staggers Rail Act of 1980 and during each of the 3 succeeding 12-month periods, a rail carrier may, in addition to rate increases authorized under subsection (b) of this section, increase any rate over which the Commission has jurisdiction under section 10709 of this title by an annual amount of not more than 6 percent of the adjusted base rate, except that in no event shall the total increase under this subsection result in a rate which is more than 118 percent of the adjusted base rate.

(2)(A) If any portion of a rate increase under this subsection is not implemented in the year in which it is authorized, such portion may, except as provided in subparagraph (B) of this paragraph, be implemented only in the next succeeding year.

(B) If any portion of the total rate increase authorized under this subsection is not implemented by the end of the 4-year period beginning on the effective date of the Staggers Rail Act of 1980, such portion may be imple-

mented in the next 2 succeeding years, except that in no event may a rail carrier increase a rate under this subsection or under subsection (d) of this section in either of such 2 succeeding years by an annual amount of more than 10 percent of the adjusted base rate.

(d)(1) Except as provided in paragraph (3) of this subsection, during the 12-month period beginning on October 1, 1984, and during each succeeding 12-month period, a rail carrier may, in addition to rate increases under subsection (b) of this section, increase any rate over which the Commission has jurisdiction under section 10709 of this title by an annual amount of not more than 4 percent of the adjusted base rate.

(2) No portion of any rate increase under this subsection which is not implemented in the year in which it is authorized may be implemented in any other year.

(3)(A) The provisions of this subsection shall not apply to a rail carrier proposing to increase a single line rate if such carrier earns adequate revenues, as determined by the Commission under section 10704(a)(2) of this title.

(B) The Commission shall, after a hearing on the record, prescribe such rules with respect to joint rates as necessary to ensure that rail carriers which earn adequate revenues, as determined under section 10704(a)(2) of this title, do not receive the rate increases authorized by this subsection unless the Commission determines that it is unable to prescribe such rules without precluding rail carriers not earning adequate revenues from receiving the rate increases authorized under this subsection.

(e)(1) Notwithstanding the provisions of section 10707 of this title, in the case of any rate increase by a rail carrier that is authorized under subsection (c) or (d) of this section—

(A)(i) the Commission may not suspend such rate increase pending final Commission action; and

(ii) except as provided in paragraph (2) of this subsection, the Commission may not begin an investigation proceeding under section 10707 of this title with respect to the reasonableness of such rate increase; but

(B) an interested party may file a complaint under section 11701(b) of this title alleging that such rate increase violates the provisions of this subtitle.

In considering any complaint challenging a rate increase that is authorized under subsection (c) of this section and that results in a revenue-variable cost percentage that is less than the lesser of the percentages described in clauses (i) and (ii) of paragraph (2)(A), the Commission shall, in determining the reasonableness of such rate increase, give due consideration to whether the carrier proposing the rate increase has attained adequate revenues, as determined by the Commission under section 10704(a)(2) of this title, giving regard to preventing a carrier with adequate revenues from realizing excessive profits on the traffic involved and also the policy of bringing to an adequate level the revenues of carriers not having an adequate revenue level.

(2)(A) If a rate increase authorized under this section in any year results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than—

(i) 20 percentage points above the revenue-variable cost percentage applicable in that year under section 10709(d) of this title; or

(ii) a revenue-variable cost percentage of 190 percent,

whichever is less, the Commission may, on its own initiative, or on complaint of an interested party, begin an investigation proceeding to determine whether the proposed rate increase violates this subtitle.

(B) In determining whether to investigate or not to investigate any proposed rate increase that results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of subparagraph (A) of this paragraph (without regard to whether such rate increase is authorized under this section), the Commission shall set forth its reasons therefor, giving due consideration to the following factors:

(i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

(ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(iii) the impact of the proposed rate or rate increase on the attainment of the national energy goals and the rail transportation policy under section 10101a of this title, taking into account the railroads' role as a primary source of energy transportation and the need for a sound rail transportation system in accordance with the revenue adequacy goals of section 10704 of this title.

This subparagraph shall not be construed to change existing law with regard to the nonreviewability of such determination.

(C) In determining whether a rate is reasonable, the Commission shall consider, among other factors, evidence of the following:

(i) the amount of traffic which is transported at revenues which do not contribute to going concern value and efforts made to minimize such traffic;

(ii) the amount of traffic which contributes only marginally to fixed costs and the extent to which, if

any, rates on such traffic can be changed to maximize the revenues from such traffic; and

(iii) the carrier's mix of rail traffic to determine whether one commodity is paying an unreasonable share of the carrier's overall revenues.

(f) In any proceeding under this section, evidence of the underlying rail carrier rate is admissible.

(g) A finding by the Commission that a rate increase exceeds the increase authorized under this section does not establish a presumption that (1) the rail carrier proposing such rate increase has or does not have market dominance over the transportation to which the rate applies, or (2) the proposed rate exceeds or does not exceed a reasonable maximum.

(h) The authority of the Commission to determine and prescribe reasonable rules, classifications, and practices may not be used, directly or indirectly, to limit the rates which rail carriers are otherwise authorized to establish under this subtitle.

(Added Pub.L. 96-448, Title II, § 203(a), Oct. 14, 1980, 94 Stat. 1901.)

§ 10728. Separate rates for distinct rail services

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may, on its own initiative or at the request of a shipper or receiver of property, establish separate rates for distinct rail services to—

(1) encourage competition;

(2) promote increased reinvestment by rail carriers; and

(3) encourage and make easier increased nonrailroad investment in the production of rail services.

(b) The Commission shall maintain expeditious procedures to permit separate rates for distinct rail services to—

(1) encourage those services to be priced in accordance with the cash-outlay incurred by the carrier and the demand for them; and

(2) enable shippers and receivers to evaluate transportation and related rates and alternatives.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1388.)

§ 10761. Transportation prohibited without tariff

(a) Except as provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide that transportation service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff whether by returning a part of that rate to a person, giving a person a privilege, allowing the use of a facility that affects the value of that transportation or service, or another device.

(b) The Commission may grant relief from subsection (a) of this section to contract carriers when relief is consistent with the public interest and the transportation policy of section 10101 of this title. The Commission may begin a proceeding under this subsection on application of a contract carrier or group of contract carriers and on its own initiative for a water contract carrier or group of water contract carriers.

(c) This section shall not apply to expenses authorized under section 10751 of this title.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1394; Pub.L. 96-296, § 33(c), July 1, 1980, 94 Stat. 825.)

§ 11121. Criteria

(a)(1) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title shall furnish safe and adequate car service and establish, observe, and enforce reasonable rules and practices on car service. The Commission may require a rail carrier to provide facilities and equipment that are reasonably necessary to furnish safe and adequate car service if the Commission decides that the rail carrier has materially failed to furnish that service. The Commission may begin a proceeding under this paragraph when an interested person files an application with it. The Commission may act only after a hearing on the record and an affirmative finding, based on the evidence presented, that—

(A) providing the facilities or equipment will not materially and adversely affect the ability of the carrier to provide safe and adequate transportation;

(B) the amount spent for the facilities or equipment, including a return equal to the carrier's current cost of capital, will be recovered; and

(C) providing the facilities or equipment will not impair the ability of the carrier to attract adequate capital.

(2) The Commission may require a rail carrier to—

(A) file its car service rules with the Commission; and

(B) incorporate those rules in its tariffs.

(b) The Commission may designate and appoint agents and agencies to make and carry out its directions related to car service and matters under sections 11123-11125, 11127, and 11128(a)(1) of this title.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1421; Pub. L. 96-258, § 1(11), June 3, 1980, 94 Stat. 426.)

§ 11122. Compensation and practice

(a) The regulations of the Interstate Commerce Commission on car service shall encourage the purchase, acquisition, and efficient use of freight cars. The regulations may include—

(1) the compensation to be paid for the use of a locomotive, freight car, or other vehicle;

(2) the other terms of any arrangement for the use by a rail carrier of a locomotive, freight car, or other vehicle not owned by the rail carrier using the locomotive, freight car, or other vehicle, whether or not owned by another carrier, shipper, or third person; and

(3) sanctions for nonobservance.

(b) The rate of compensation to be paid for each type of freight car shall be determined by the expense of owning and maintaining that type of freight car, including a fair return on its cost giving consideration to current costs of capital, repairs, materials, parts, and labor. In determining the rate of compensation, the Commission shall consider the transportation use of each type of freight car, the national level of ownership of each type of freight car, and other factors that affect the adequacy of the national freight car supply.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1421; Pub. L. 96-448, Title II, § 224(a), Oct. 14, 1980, 94 Stat. 1929.)

§ 11701. General authority

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier, broker or freight forwarder is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. If the Commission finds that

a motor private carrier is violating section 10530 of this subtitle, the Commission shall take appropriate action to compel compliance with such section. The Commission may take that action only after giving the carrier, broker or freight forwarder notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle or a motor carrier or motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title, or freight forwarder. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Commission under subsection (a) of this section is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.

(Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1449; Pub. L. 96-296, § 26(a), July 1, 1980, 94 Stat. 818; Pub. L. 98-554, Title II, § 226(c)(4), Oct. 30, 1984, 98 Stat. 2851; Pub. L. 99-521, § 12(a), Oct. 22, 1986, 100 Stat. 2998.)

§ 11705. Rights and remedies of persons injured by certain carriers

(a) A person injured because a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title or a freight forwarder does not obey an order of the Commission, except an order for the payment of money, may bring a civil action to enforce that order under this subsection.

(b) (1) A common carrier providing transportation or service subject to the jurisdiction of the Commission under chapter 105 of this title is or a freight forwarder liable to a person for amounts charged that exceed the applicable rate for transportation or service contained in a tariff filed under subchapter IV of chapter 107 of this title or the applicable freight forwarder rate, as the case may be.

(2) A common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title is liable for damages sustained by a person as a result of an act or omission of that carrier in violation of this subtitle.

(3) A common carrier providing transportation or service subject to the jurisdiction of the Commission under subchapter II or IV of chapter 105 of this title or a freight forwarder is liable for damages resulting from the imposition of rates for transportation or service the Commission finds to be in violation of this subtitle.

(c) (1) A person may file a complaint with the Commission under section 11701(b) of this title or bring a civil action under subsection (b) (1) or (2) of this section to enforce liability against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of

this title. A person may begin a proceeding under section 10704 or 10705 of this title to enforce liability under subsection (b)(3) of this section by filing a complaint with the Commission under section 11701(b) of this title.

(2) When the Commission makes an award under subsection (b) of this section, the Commission shall order the carrier to pay the amount awarded by a specific date. The Commission may order a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title to pay damages only when the proceeding is on complaint. The person for whose benefit an order of the Commission requiring the payment of money is made may bring a civil action to enforce that order under this paragraph if the carrier does not pay the amount awarded by the date payment was ordered to be made.

(d)(1) When a person begins a civil action under subsection (b) of this section to enforce an order of the Commission requiring the payment of damages by a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I or III of chapter 105 of this title, the text of the order of the Commission must be included in the complaint. In addition to the district courts of the United States, a State court of general jurisdiction having jurisdiction of the parties has jurisdiction to enforce an order under this paragraph. The findings and order of the Commission are competent evidence of the facts stated in them. Trial in a civil action brought in a district court of the United States under this paragraph is in the judicial district (A) in which the plaintiff resides, (B) in which the principal operating office of the carrier is located, (C) if a rail carrier, through which the railroad line of that carrier runs, or (D) if a water carrier, in which a port of call on a route operated by that carrier is located. In a civil

action under this paragraph, the plaintiff is liable for only those costs that accrue on an appeal taken by the plaintiff.

(2) All parties in whose favor the award was made may be joined as plaintiffs in a civil action brought in a district court of the United States under this subsection and all the carriers that are parties to the order awarding damages may be joined as defendants. Trial in the action is in the judicial district in which any one of the plaintiffs could bring the action against any one of the defendants. Process may be served on a defendant at its principal operating office when that defendant is not in the district in which the action is brought. A judgment ordering recovery may be made in favor of any of those plaintiffs against the defendant found to be liable to that plaintiff.

(3) The district court shall award a reasonable attorney's fee as a part of the damages for which a carrier is found liable under this subsection. The district court shall tax and collect that fee as a part of the costs of the action.

(Pub.L. 95-473, Oct. 17, 1978, 92 Stat. 1451; Pub.L. 99-521, § 12(b), Oct. 22, 1986, 100 Stat. 2998.)